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TWENTY YEARS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: SUCCESS OR FAILURE?

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

WASHINGTON, DC

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TWENTY YEARS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: SUCCESS OR FAILURE?

THURSDAY, SEPTEMBER 10, 1987

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in room 628, Dirksen Senate Office Building, Hon. John Melcher (Chairman of the committee) presiding.

Present: Senators Melcher, Heinz, Chiles, Bradley, Shelby, Grassley, Chafee, Durenberger and Wilson.

Staff present: Craig Obey, legislative correspondent; Jim Michie, chief investigator; Michael Werner, counsel for investigations; Lloyd Duxbury, professional staff; Dianna Porter, professional staff; Larry Atkins, minority staff director; Diane Linskey, minority research associate; Kelli Pronovost, hearing clerk; and Dan Tuite, printer.

OPENING STATEMENT BY SENATOR JOHN MELCHER, CHAIRMAN

The CHAIRMAN. The committee will come to order.

This morning we are holding this public hearing on the question of the Equal Employment Opportunity Commission's enforcement of the Age Discrimination Employment Act. This subject is not one that the committee expected to hold a hearing on.

We are holding this hearing because we've learned through a variety of sources that the Age Discrimination Employment Act simply isn't being enforced. They say that over the past several years a pattern has developed which on its face is counterproductive for older Americans. In the Age Discrimination in Employment Act passed almost 20 years ago, Congress directed that age would not be used to justify employment discrimination. And as we all recognize, if such an Act is to be enforced it places a special burden on the Commission to make certain that employee's rights are protected.

Now the statute says that those employees over 40, are the ones we are looking at and seeking to protect. Unfortunately, the Commission has made several decisions that simply do not follow the intent, purpose, even the actual language of the statute. We find that there's been failure in protecting the employees in the number of cases that are brought for litigation. At a time when the employees are undergoing the stress of a shift in employment because of cutbacks in the number of employees at various companies we find the Commission not alert, and in fact going the opposite direction in trying to make sure that the employee's rights are protected.

Now what am I talking about? Well, for one thing I'm talking about a decrease in the number of Commission employees who determine whether or not somebody's rights have been violated. The Commission's own data demonstrates two things. The number of Commission staff who determine whether or not an employee's rights have been violated because of age has gone down. And in addition to that the quality or the experience of the employees at the Commission, as evidenced by their GS rating, has gone down. There are now more GS-7's and -5's and GS-1's and fewer GS-11's and above.

What has this meant? Because fewer cases that have been brought there has been less opportunity to protect those employees who have been discharged because of age. Take the case of whether or not there should be voluntary waivers. It seems to me that the statute is clear that they have to be supervised and that an employee shouldn't be coerced into giving a voluntary waiver of his rights. The Commission has found that waivers don't have to be supervised, but I think any fair reading of the statute would say that they must be supervised.

Now second and sort of in the same vein the Commission has stated that apprenticeship programs are not covered by this statute. That's a surprise, I think, to all of us here in Congress and it's quite a surprise to everybody that would like to see the Age Discrimination Employment Act be meaningful and be enforced.

I think given this kind of a record on both waivers being unsupervised and apprenticeship programs not being covered is bad enough. But perhaps the most serious of all failures of the Commission over the past several years has been to protect pension rights of the employees. And that is very important to us in Congress. The employee's pension rights must be protected. We're going to hear this morning from some individuals who have one way or another sought to protect their own rights when the Commission has failed to assist them. And then we're going to hear from organizations who are interested in making sure that the Age Discrimination Employment Act is enforced, and that the Commission is doing its job. Those will be the chairman of the board of the American Association of Retired Persons, who has had a longstanding interest in the enforcement procedures under this act and the executive director of the National Senior Citizens Law Center, which also plays a very distinct and important role, as a private group, to make sure that older Americans are protected. Then we'll also hear from the director of the Older Women's League, which likewise has had a longstanding interest in this. Finally, we will hear from the Commission itself who will attempt to show us why they've done what they've done and demonstrate to us where their failures have been and what they're doing to correct them.

Senator Heinz.

[The prepared statement of Senator Melcher follows:]

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United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

OPENING STATEMENT

SENATOR JOHN MELCHER
Chairman, Senate Special Committee on Aging

September 10, 1987 hearing
Twenty Years of the Age Discrimination in Employment Act: Success or Failure?

Good Morning. On behalf of my colleagues on the Special Committee on Aging, I'd like to welcome everyone to this morning's hearing on the effectiveness of the Equal Employment Opportunity Commission in carrying out its obligations under the Age Discrimination in Employment Act.

This year marks the twentieth anniversary of the enactment of the Age Discrimination in Employment Act. It was in 1967 that Congress first went on record opposing discrimination in any aspect of employment because of age. In fact, only last year, Congress went even further and amended the Act to eliminate mandatory retirement for those in all but a few designated professions.

Over the past few months, I have become concerned about the effectiveness of EEOC in administering and enforcing the Act. I have also heard from constituents who have had problems trying to file discrimination complaints with the Commission. These include allegations that EEOC lets cases languish for months at a time without taking any substantive action and that the EEOC staff is poorly trained. Some constituents have even told me that EEOC staff members have lost the charges they filed.

Frankly, I am not at all convinced that the EEOC is doing a good job in protecting our older workers from discrimination. Delays in complaint processing have caused undue hardship for many people. I was shocked to learn that over one-third of all litigation proposals being forwarded to the Commission for approval involve cases that are already beyond the two year statute of limitations. This is absolutely inexcusable.

In addition, a July 1987 General Accounting Office report charges that one EEOC field office has been closing nearly one third of all charges without a full investigation. According to GAO, some EEOC personnel have even been instructed to ignore cases that may require extensive investigation.

During the past few months, EEOC has also made several judgments in its rulemaking process that I find questionable. These include a decision permitting employees to waive their rights under the Age Discrimination in Employment Act, as well as a decision to continue exempting apprenticeship programs from the provisions of the Act. In my mind, these decisions point to a disturbing trend in EEOC's defense of the older worker.

I have also been concerned to learn that the number of complaints receiving some type of settlement after a charge is filed with the EEOC has declined drastically since 1980. While just over 32 percent of all cases filed with EEOC in 1980 were settled, in 1986 this number had declined to a mere 12.5 percent. On top of this, EEOC's case backlog is creeping upward. While the backlog in 1982 consisted of 33,417 cases, by 1986 it had increased to 50,767. I find these statistics disturbing, especially coming from an EEOC that claims to be concerned with the timeliness of addressing charges.

All workers depend on the EEOC to protect their rights. My concern is that EEOC may be shirking its responsibilities. Today, I plan to find out.

Today, we'll be hearing from three victims of age discrimination who will tell us in their own words about their experiences in dealing with the EEOC. All three experienced lengthy delays by EEOC in pursuing their cases.

Representing the Equal Employment Opportunity Commission will be its' Chairman, Mr. Clarence Thomas, along with the Commission's Vice-Chair, R. Gaull Silberman.

In addition, we'll be hearing from Dr. C. Kermit Phelps, Chairman of the Board of Directors of the American Association of Retired Persons and from Burton Fretz, Executive Director of the National Senior Citizens Law Center.

Finally today, we will hear from Alice Quinlan, Public Policy Director for the Older Women's League.

I'm looking forward to our witnesses' testimony today, and would like to thank you all for being here. Let's Begin.

STATEMENT BY SENATOR JOHN HEINZ

Senator Heinz. Mr. Chairman, first let me commend you on holding this hearing and for a most thoughtful opening statement.

This is a hearing on a subject that has long been a concern of the Committee on Aging, and it is, has been, and will be a very important topic of our interest and concern because of the demonstrated need and our commitment to promoting one of this Nation's most valued resources, namely the older worker.

We can also note with some satisfaction as we go into the second quarter of the 100th Congress, that two important victories were won in the 99th Congress. We eliminated the potential for mandatory retirement at age 70 through an amendment to the Age Discrimination in Employment Act, and we guaranteed to those who worked past age 65 the right to continue to accrue and earn pension benefits. And as Chairman of this committee in the last Congress, I was, together with you and others, Mr. Chairman, very active in the passage of both of those provisions. Neither one I might add, was secured without a battle. And it's ironic that in the face of study after study to the contrary, a good number of them done by the Reagan administration, some Members of Congress and a few hardliners in the business community still raise the battered stereotype as the older worker as an unproductive and unneeded person. But we fought that battle and we won. And with these victories we ran our legislative bulldozer through the last barrier, at least the last legal barrier, to freedom of choice for older workers. And I think we've paved the way for a skilled and productive work force in the future.

Mr. Chairman, as I said, the Special Committee on Aging has been at the point on all these issues. We could choose simply, I suppose, to congratulate ourselves and rest on our laurels. But that is not the choice that we have made because it would be the wrong choice. And we're here today, Mr. Chairman, with your leadership because a law on the books is worth little without both education and awareness on the one hand, and enforcement on the other. And the sad fact is that some employers, either out of ignorance or perhaps out of greed, violate the Age Discrimination in Employment Act, trample on the rights of older workers on the chance that they won't get caught.

One of my constituents from the Pittsburgh area is going to testify today about his own exposure to age bias on the job. That's Mr. Ronald Hallas, who was cut from the payroll of a major steel company as part of a company retrenchment in 1982. His chronological age alone, 52, condemned him to the ranks of the employed. Neither his 35 years as a company employee nor his track record as a plant foreman mattered, apparently, at all.

And so Mr. Hallas will tell us how it feels to be coerced into early retirement and his disappointment with a shortsighted and age-biased employer. He will also tell us of his still unresolved struggle for justice and the unwillingness of the EEOC to pursue his age discrimination case.

It is unfortunate that we need an EEOC to keep employers in line with the law, but we do. It is the job of this committee and our colleagues in both bodies of the Congress to ensure that the EEOC performs to the best of their ability. We need an agency that sends a clear message to employers. That message is that to discriminate on the basis of age is as repugnant to the law as to discriminate on the basis of sex, or color, or religion. Each worker must be evaluated on merit and merit alone.

It is my view that as our reproductive rates drop, both in America and in other western countries, that we, and we Americans specifically, will increasingly rely on older workers to make our economy strong as we move into the next century. Allowing companies to discriminate against workers on the basis of age not only hurts our productivity, but I believe it damages our integrity as a Nation as well. And so we need to move forward to educate American workers and companies as to their rights and obligations under the ADEA. We need to make sure that workers are well informed of their rights and options before they sign a waiver of their ADEA rights. Finally, we need to make sure that not only workers, but the EEOC can manage the procedures we've set forth for pursuing complaints under the Age Discrimination Employment Act.

And, Mr. Chairman, I look forward to the testimony today and hope that it will guide us to work to eliminate age discrimination from the employment setting.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Heinz.

Senator Shelby.

STATEMENT OF SENATOR RICHARD SHELBY

Senator SHELBY. Thank you. Mr. Chairman, may I begin this morning by congratulating you, and the committee staff for your work in organizing this hearing. I'm especially pleased to be here after a hectic, yet successful, and at times even relaxing August recess. Like many of my colleagues here today, I return to Washington with a renewed sense of direction, commitment and energy, anxious to greet the last months of the first session of this historic 100th Congress.

With the same foresight he has used to guide us in our examination and valuation of the pressing issues facing the elderly population in this country, I believe the Chairman, Senator Melcher, leads this committee once again into a new and an important area. Today our task is to assess the Age Discrimination in Employment Act, ADEA, 20 years after its inception. With the aging of America's work force it is imperative that we take the time to consider the viability and the effectiveness of this legislation.

I know that none of us are strangers to the staggering statistics that indicate the tremendous growth expected in the over age 65 population in the next decades. We are also aware through our day-to-day contacts with seniors from our own States that the words of former Congressman Burke, during the passage of ADEA back in 1967, are still true. He said, and I quote, "As a general rule, ability is ageless." What we're up against, in addition to the problems we are to address today, unfortunately, is a country whose national mind set does not include an elderly perspective. It seems to me that in this country there is a pervasive negative feeling associated with growing old. Perhaps it's a subconscious prejudice aimed at our older citizens. What the majority of people do not seem to be aware of is that senility does not automatically set in after 60.

There's a long honored tradition of respect for the elderly woven into the fabric of many cultures. Somewhere along the line this thread of respect seems to have unraveled in this country. Nowhere is it said or written that life ends after age 65. We in this Congress are privileged to work with some of the most dynamic and influential statesmen of our day. Do we ever question the fact that 73 of our colleagues are over age 65? The answer is obviously no. Their vitality and spunk forces us to respect them, not for their gray hairs or wrinkles, but for their being active players, leaders, hard workers.

And so today our task is to not only study the Equal Employment Opportunity Commission's enforcement of ADEA, an evaluation that will lead us to consider the apparent lack of an effective systemic program, the staggering increase in no-cause findings over the past 6 years and the rising number of backlogged cases. When evaluating ADEA, it's equally important I believe for us to consider that the act is in place as much as to promote as it is to enforce. Indeed in its statute the purpose of the act is outlined as such, and I quote, "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment". We need then to determine one, if the act is still as viable today as when enacted 20 years ago. Two, if the enforcement of the act is being properly carried out, and finally, if promotion of employment of older persons is a reality.

Hand in hand with membership on this committee seems to come a special appreciation for the assortment of problems that plague our elderly population. To be a member of this committee is to assume responsibility, as I see it, for the elderly of this country. I know that in our work today we will not forget this responsibility or the guaranteed right of every older American to be free from employment discrimination.

Senator Bradley. Mr. Chairman.

The Chairman. Senator Bradley.

STATEMENT BY SENATOR BILL BRADLEY

Senator Bradley. Mr. Chairman, I would just ask unanimous consent if my statement be printed in the record. I won't take the committee's time.

The Chairman. Without objection, it will be printed in the record at this point.

[The prepared statement of Senator Bradley follows:]

STATEMENT OF SENATOR BILL BRADLEY
AGING COMMITTEE SEPTEMBER 10, 1987 HEARING
AGE DISCRIMINATION IN EMPLOYMENT

I commend Chairman Melcher for holding today's hearing to investigate charges that the Equal Employment Opportunity Commission (EEOC) is failing to fulfill its responsibility to enforce federal anti-age discrimination legislation. I hope that this hearing sheds light on these serious allegations.

Longer life expectancies and the aging of the post-World War II "baby boom" generation have contributed to a gradual aging of the U.S. workforce that will accelerate over the next several decades. There is no better time than now, on this twentieth anniversary of the Age Discrimination Employment Act (ADEA), to re-examine the issues surrounding protection of the rights of our aging population.

Equal employment opportunity is a right of every American. Recognizing that this right extends to workers of all ages, the ADEA was enacted in 1967 to prohibit discrimination against workers on the basis of age. Congress vested enforcement of this important act in the EEOC in 1979. By all accounts, the EEOC, then under the leadership of Eleanor Holmes Norton, made many significant changes that greatly improved the Commission's effectiveness.

Unfortunately, charges of EEOC unwillingness to enforce employment discrimination laws have resurfaced under the current Administration. Some suspect that this deterioration in performance reflects more generally the Reagan Administration's lack of concern about equal employment opportunities. Critics cite a decrease in the number of cases approved for litigation by the Commission, an increase in the number of backlogged cases, and staff reductions since 1980, as just a few glaring examples of factors that have contributed to the EEOC's failure to carry out its mandate. A July, 1987 GAO case study of the effectiveness in investigating discrimination cases of one of the EEOC's district offices confirms many of these claims. According to the AARP and other advocacy groups for the aging, many of the new EEOC policies directly affect proper enforcement of the ADEA.

Given the recent dismal evaluations of EEOC's performance, more intense Congressional oversight of the Commission is warranted. We must ensure that victims of employment discrimination receive the assistance that they need and are entitled to under the law. We must not reverse two decades of progress in the protection of worker rights.

Congress has outlawed the use of arbitrary age limits as a basis for employment decisions. Older Americans are entitled to prompt and thorough investigation and resolution of employment discrimination cases by the EEOC. I look forward to any facts that this hearing may uncover about the EEOC's performance in these areas.

Senator **Bradley**. I want to commend you for the hearing. I think it's very important.

The **Chairman**. Thank you, Senator Bradley.

Senator Grassley.

STATEMENT BY SENATOR CHARLES E. GRASSLEY

Senator **Grassley**. Thank you, Mr. Chairman.

I think it's fair to say that 20 years after passage of the Age Discrimination in Employment Act that older workers still encounter employment discrimination. Such discrimination certainly represents a problem with which Congress should be concerned and from that standpoint, I too, like everybody else on this committee, appreciate the attention that the chairman brings to this issue through holding this hearing today.

One of our national priorities has to be to see to it that older workers who are qualified to work and who wish to work should be able to do so. This is so because many older workers need the income and because a policy of employing older people can help ease the burden on our pension system. And also because we need the contribution that older workers can make to our economy and to society. And most importantly, Mr. Chairman, and the reason I think you're holding this hearing, is because it is just that they be allowed to work if they want to based upon their qualifications for work and their wanting to work.

In fact there is every reason to make it possible for older workers to continue working if they want to and no good reason, that I can see, for encouraging or permitting them to be kept from work against their wishes simply because of age. Insofar as age discrimination keeps individuals from working, we should try to eliminate it. The work of the Equal Employment Opportunity Commission in this regard is therefore important and it certainly fits that this committee review the Commission's work with respect to age discrimination.

Now I know that there are three major parts to this hearing today. Mr. Chairman, I however am particularly interested in the implementation by the Commission of the pension accrual legislation which was passed late in the last Congress and which takes effect January 1, 1988. I would like to know if the EEOC contemplates any problems in developing regulations for this legislation and when these regulations will be finished.

Mr. Chairman, along the line of my last interest in the pension accrual legislation then, I'm going to leave for the consideration of the committee, questions to be answered in writing by the Commission and by the AARP on that specific point.[1]

The **Chairman**. We will submit those questions to be answered as the Senator has indicated.

Senator **Grassley**. Mr. Chairman, I'm finished.

The **Chairman**. Senator Chafee.

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[1] See appendix III.

STATEMENT BY SENATOR JOHN CHAFEE

Senator CHAFEE. Thank you, Mr. Chairman. I'm glad you're holding these hearings. I think it's a very worthwhile issue.

There's no question, as has been pointed out, we have an aging work force. With the misfortune that comes from a shifting economy and the prevalence of divorce, older workers need now more than ever to be assured of access to the job market. It's all well and good to have a strong bill on the record protecting the aged and preventing discrimination based on age in the work force, but if the law isn't enforced, then we haven't got much. That's the whole purpose of these hearings.

I'm particularly interested in the early retirement incentive programs: Dr. Phelps from the American Association of Retired Persons has some interesting testimony on that which I've looked over. I hope we'll review that proposal especially carefully. Early voluntary retirement is fine if the employee knows what he's getting into, and also if the incentives for early retirement aren't themselves discriminatory. There's no question that the employee is always in an unequal bargaining position in these deals. So I am hopeful that these hearings will be beneficial, and I regret I can't stay the whole time, due to another commitment. Nevertheless, I certainly will review the record and I'm interested in the proceedings.

Thank you, Mr. Chairman.

I'd like to submit a statement for the record.

The CHAIRMAN. Yes, it will be made part of the record right at this point. Thank you, Senator.

[The prepared statement of Senator Chafee follows:]

STATEMENT BY
SENATOR JOHN H. CHAFEE
IN THE UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING

September 10, 1987

Mr. Chairman, twenty years ago Congress enacted a law declaring that no person could be presumed incompetent solely because of age--as long as he or she was under 65. Two years ago Congress amended that Act, removing the upper age limit. Since that time, the Age Discrimination in Employment Act has stood for one principle that I believe in quite strongly: ability is ageless.

Today, twenty years after the original Act's passage, this law has grown in importance. With the misfortune that a shifting economy and the prevalence of divorce bring, older Americans need now more than ever to be assured of access to the job market. Fortunate factors also make this Act of increasing importance. Improved health, longer life, and the maturation of the post World War II baby boom generation has made those over forty the fastest growing segment of our labor force.

We cannot question the premise of this Act, ability is ageless. Yet, a law is only as good as its enforcement. With an ever growing portion of our labor force made up of older Americans, it is our job to make sure that this law remains viable and effective. Two decades ago Congress made a commitment to ensure that older Americans would be judged on the basis of their ability, rather than their age.

As lawmakers, we entrust the enforcement of our creations to designated agencies that, like we do, serve the American people. The enforcement of the Age Discrimination in Employment Act is entrusted to the Equal Employment Opportunity Commission. It is the EEOC's duty to make sure that the law is brought to life through swift and meaningful action. Without such enforcement, a law becomes nothing but ink on paper.

I must admit, Mr. Chairman, that I am concerned about reports of an expanding case backlog and an exceedingly low claim settlement rate at the Equal Employment Opportunity Commission. I understand that a "Rapid Charge Processing System" helped reduce case backlog by more than a two-thirds in the late seventies. I commend the leadership that managed this feat, and I urge the current Commission to follow their lead, and continue to improve procedures.

The Equal Employment Opportunity Commission has recently issued new regulations for the Age Discrimination and Employment Act. These new regulations allow "unsupervised" waiver of rights under the law. They also continue to allow an exemption for "apprenticeship programs". I am troubled by both of these issues.

An "unsupervised" waiver would release the employer from liability under the ADEA if the employee makes a "knowing and voluntary waiver" of his rights in exchange for money or other benefits. On the surface this waiver may sound harmless, or even advantageous, permitting two parties to bargain for a mutually beneficial arrangement.

And yet, I am troubled. The Age Discrimination in Employment Act was enacted in the first place because of Congress's realization that an employee is in an unequal bargaining position. That's why we felt it wise to provide protection, a safeguard, in an otherwise free contractual activity. An unsupervised waiver would undermine the basic recognition of the need for protection.

I am also distressed that the new regulations, in their silence on the subject, appear to condone an existing EEOC agency practice of exempting apprenticeship programs from coverage under the ADEA. Apprenticeships are those positions that due to their "skill training" aspects are legally filled at below minimum wage salaries. I have heard the argument for allowing such an exemption, that such programs are created for "young people" to enable them to acquire job skills. This may be true, but events such as layoffs and divorce can make it imperative for a more mature person to learn a new job skill. The kind of thinking that says only the young can learn shows exactly why we needed the ADEA in the first place.

It seems that we ask the wrong question when we wonder if the ADEA has been a success or a failure. The law is undoubtedly a good one. The presumption that a person is incompetent solely because of his or her age has no place in this country. Yet to stand behind our words, we are going to need better enforcement. Instead of loosening the regulations and allowing more loopholes we need to tighten enforcement and raise our expectations.

We have, in Congress, worked on much legislation in the past twenty years that has contributed to greater equity in the workplace. The Age Discrimination in Employment Act is a vital part of this policy. But I repeat, a law is only as good as its enforcement. We must not abandon it now.

In closing, I urge the EEOC to tighten its reins, and work toward improving its current enforcement record. Part of that improvement, in my opinion, would be to amend these new regulations in hopes of better representing the intent and the spirit of the Act itself.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Durenberger.

STATEMENT BY SENATOR DAVE DURENBERGER

Senator DURENBERGER. Mr. Chairman, thank you.

Mr. Chairman, I think it is important that we recognize not only your leadership in this but the leadership of the ranking member of this committee who last year surprised a lot of people by lifting the mandatory retirement at age 70. And the members of this committee who are also on the Finance Committee know the work that we went through in entitling people over age 65 to continue to earn pensions. There's a lot of talent on this committee that has already been making some contributions to the subject of the hearing.

But as I look at the question that you raise in this hearing, which is how successful have we been over 20 years in the area of discrimination based on age, I've come to the conclusion from personal experience that we've been very unsuccessful. We've all had that kind of experience with seeing a third of the males in this country over 52 retired; some of them rejected from the work force for a wide variety of reasons including that they are overtrained. This is very hard on families and very hard on income security. It seems to me it's the wrong way for a nation to go.

Now as we look to the future, Mr. Chairman, I'd suggest that this can become less of a problem. This Nation is running out of workers and it's running out fairly quickly. But you still don't see in the work place the sensitivity to the talents and the abilities and the experience of older workers. You don't see the commitment to reeducation and retraining that ought to be there. And so, in addition to focusing on the allegations relative to failures and the complaint process in EEOC, I hope we stick with age discrimination on a broad basis in this committee, and look at the many ways and the many subtle ways in which this society discriminates against seniors in this country, including by its failure to invest in anything other than the retirement of older Americans.

The CHAIRMAN. Thank you, Senator.

We'll now hear from our first witness, Mr. Jules Lusardi.

STATEMENT OF JULES LUSARDI, FORMER EMPLOYEE OF XEROX CORP.

Mr. LUSARDI. I wish you, Senator, and your whole committee, much success in trying to come to grips with the problems that seem to be facing all of us right now. I hope that the end result of these meetings and whatever has to be done after these meetings will, in effect make things better for the older workers in society here in the United States.

To provide some background here, I'm a lead plaintiff in a class action against a large company. I was employed by the company in November of 1966 as a sales representative for office products. Salary and bonuses based on performance for several years prior to 1981 was in excess of $40,000.00 a year. At that time I was just entering my forties. Performance as a sales representative was not questioned. As a matter of fact, in 1981 I attended what they call the President's Club trip, which was earned for sales achievement in 1980. Then on November 6, 1981, the rug was pulled. I was brought into an office in New York City and told that I had been terminated as a result of a reduction in force. In fact the way they put it was that there was an acute need to reduce the work force.

Now most of us don't consider being fired until it happens to us. You think, oh the guy down the street got fired, or somebody else gets laid off. You really don't think too much about it. But I think a lot of us have to be very concerned about what's happening with these people. In this instance, we're talking about older workers, because it seems to impact them more. I know, that in my case I thought about, what the founding fathers said in terms of the fact that we're entitled to things like life, liberty and the pursuit of happiness. For most adults, the pursuit of happiness really is tied very closely to the ability to perform some kind of productive work in the society. If you're not able to do that and if that right is taken away from you, then not only are you unproductive in terms of what you're able to do for other people, but your self-esteem goes way down. And then it starts to effect what I consider the basic fiber of life in America. And that's the family.

If it's a man working, it can be particularly devastating because masculinity and manhood, is tied into your job and your ability to provide for your family. If termination happens to somebody that's into their forties or fifties, for the most part these are the people that are the mainstays of society here in America. They may have children in colleges or in high school. I had at the time, a daughter in grammar school, and three daughters in high school. And what happens is that it becomes more difficult to maintain and do those things that one should do in the role of leader of the family when you don't have a job to back you up and when you don't have that self-esteem that you do have when you are working.

And these problems can occur with women too. It's not just men. There are a lot of households now being led by single women. So this doesn't only apply to men.

Getting back to what happened to me though, I discovered that a number of other salesmen had also been terminated. And they were also over 40 years old. So we got together and went to an attorney and after a short investigation, it became clear that the company had retained younger people with less time in service than we had. So myself and the other three representatives filed an age discrimination complaint with the EEOC. This was done in January 1982. We waited for a year to see what the EEOC would do. We were looking for them to take affirmative action. But they didn't.

During this period we also discovered that the company had advertised in the New York Times—unbelievable—for sales representatives doing the exact same job that we were laid off from because of their need to "reduce the sales force". So it became clear to us that the reduction in force was only a guise to get rid of older employees. We authorized the attorney to bring suit under the Age Act.

The filing of this suit was picked up by Rochester newspapers, and then what happened was unbelievable. People started calling us—literally hundreds of people from this company, called us up to tell us their stories. Because of this we decided to bring the suit as a class action in behalf of all people 40 and over at this particular company. So we had a problem that wasn't just affecting three or four people. And as it affected so many people at this company I suspect that it's happening all over the United States.

After a Federal Judge certified the case as a class action, 1,300 former and present employees joined the suit. During this time the EEOC was kept aware of the litigation against the company. It received information and statistics that were developed by our attorneys. In April 1984 the EEOC sent this company a letter stating that it had evidence that the company had, indeed, engaged in age discrimination practices. Two years later (I have noted here it's July 14th, 1986), the EEOC notified the company again, that the staff investigation had led to a conclusion that it had again committed age discrimination. During the 3-year period, 1983 to 1986, our attorneys were taking depositions, reviewing thousands—you should have seen these stacks of paper, it was really a problem and a tough job—thousands of documents, had some special consultants come in, compile employment statistics for this company. One statistic that came out, to me, was really startling. That statistic is: That while 3,000 people 40 years old and over had been terminated or forced to retire due to an alleged need to reduce the force, 25,000 new employees were hired. And almost all of them were under 40—and of those 25,000, 7,000 of them were sales representatives.

So this information demonstrated to us, anyway, that maybe we should go to some kind of a jury trial because this company was guilty of violating the Age Act on a company-wide basis. There were more hearings in January and February of this year, and I attended these hearings, our attorney stated that one reason this case had merit and should be heard by a jury was that the EEOC staff itself had concluded that this company had violated the Age Act during the same period that was involving our own private class action.

Now within 3 weeks after the February hearing in Federal Court, the EEOC suddenly, and I note here mysteriously, decides not to take any enforcement action against the company. And this was in the face of a staff recommendation that enforcement was necessary. So now I appear here before you, not just as an individual, but as a representative of more than 1,300 people in our case, and thousands of people out in society as a whole, who wonder what the EEOC is doing and for whom are they working.

This is something that concerns me greatly. And as I said before, you don't think about it—you don't think about the problems that can occur when somebody loses their job until it happens to you. Only then do you have more empathy for the guy down the street when it happens to him. This is something that tears at the moral fiber of our whole society. Because, as I said before, the family unit starts to break down, attitudes of students coming out of college start to break down too, because as they go into new companies the doors of opportunity are open for them. There's an exciting future ahead for them, but when they start to see that other people in the company are starting to go out the back door as they're coming in the front door, these new hires start to have a jaundiced view of business. So then in the long term business business also suffers. Then if business suffers, I think the country suffers. So I certainly hope you people are successful in coming to grips with this problem and achieving some positive results so that we don't have to be dealing with this a few years down the road.

If there are any questions I'll be happy to answer them.

The **CHAIRMAN**. Mr. Lusardi, after 17 years—and the company is Xerox, is that correct?

Mr. **LUSARDI**. It was 15.

The **CHAIRMAN**. It was 15. And the company is Xerox?

Mr. **LUSARDI**. Yes, it was.

The **CHAIRMAN**. You were 41 at the time, in 1981?

Mr. **LUSARDI**. Yes.

The **CHAIRMAN**. You started then when you were——

Mr. **LUSARDI**. Twenty-six.

The **CHAIRMAN**. Twenty-six years of age, for Xerox.

Mr. **LUSARDI**. Yes.

The **CHAIRMAN**. And a salesman you'd worked yourself into the position of I believe you stated $40,000 a year income?

Mr. **LUSARDI**. It was in excess of that. Maybe $48,000.

The **CHAIRMAN**. Forty to fifty thousand?

Mr. **LUSARDI**. It was in that range.

The **CHAIRMAN**. And after being noted just a year previous as a outstanding salesman. Is that why you won the trip to Europe?

Mr. **LUSARDI**. That's true. What they call it is President's Club. If you achieve certain higher targets you win.

The **CHAIRMAN**. So you achieve a certain level of sales?

Mr. **LUSARDI**. Right.

The **CHAIRMAN**. And so within a few months then, you're discarded?

Mr. **LUSARDI**. That's right.

The **CHAIRMAN**. A reduction in force?

Mr. **LUSARDI**. Correct.

The **CHAIRMAN**. Now you started action through an attorney, but you also filed a complaint—what year was that, 1982?

Mr. **LUSARDI**. Yes.

The **CHAIRMAN**. Within a matter of months then you filed a complaint with the EEOC?

Mr. **LUSARDI**. That's correct.

The **CHAIRMAN**. And the Commission, except for sending a letter in 1983, was that their answer to you, or was it 1984 they sent a letter to Xerox?

Mr. **LUSARDI**. They sent several answers back. My understanding is that initially they were going to do nothing about it. That's why we had decided to bring suit ourselves. And then when it seemed like we were getting somewhere with the suit, they came out with a letter twice—I think I did say once in 1983 and once about 2 years later—stating that now they had discovered that the company had done something wrong and it was ended practicing age discrimination. But I don't know what they did in terms of following up.

The **CHAIRMAN**. Well, let's see. We've got a case where in 1980 you're declared to be a member of the President's Club on the basis of ability, that is sales?

Mr. **LUSARDI**. Yes.

The **Chairman**. And a few months later in 1981, you're part of a reduction in force. And that reduction in force somewhere in the neighborhood of 3,000 employees?

Mr. **Lusardi**. Three thousand people that were over 40.

The **Chairman**. Who happened to be over 40?

Mr. **Lusardi**. That's right. There was more than 3,000 in that reduction in force. I think it was closer to 7,000.

The **Chairman**. Closer to 7,000. But of that 3,000 were over 40?

Mr. **Lusardi**. That's correct.

The **Chairman**. And so as a result of that you started a suit which has now been joined by 1,300 other employees?

Mr. **Lusardi**. That's correct.

The **Chairman**. Well, it seems to me that there are two things for this committee to learn. First of all the lack of attention on the part of the Commission. You did file a complaint with them, so they're well aware of what the incident was. Second, it would appear that simply because you were 41 you were part of this reduction in force.

Mr. **Lusardi**. That's how it appeared to us.

The **Chairman**. Well, I commend you for going to court on it because I think that's exactly why the Act was passed by Congress, but as I said at the outset this kind of a law is only as good as the enforcement agency. And in this case it's the Equal Employment Opportunity Commission that is the enforcement agency.

I want to thank you very much for your testimony. It's very clear. It's very much of a picture.

Mr. **Lusardi**. Thank you.

The **Chairman**. Senator Shelby.

Senator **Shelby**. Thank you, Mr. Chairman.

Were you terminated in 1981?

Mr. **Lusardi**. Yes.

Senator **Shelby**. And it's 1987, six years approximately later, and there has been no resolution of the case, right?

Mr. **Lusardi**. No resolution of that case. And also I might add that at the end of 1981 and into early 1982 was a difficult time in terms of finding jobs. Even today—it's always difficult to find a job.

Senator **Shelby**. Have you found a job?

Mr. **Lusardi**. Oh, yes.

Senator **Shelby**. You found a better job?

Mr. **Lusardi**. I've worked with several companies since then. And it's interesting because at the time that I was with that first company, your understanding, based on what you hear from the company and what's going on and the type of rules that they seem to have there, indicate that you can do a job for them and continue to produce and someday you'll be able to enjoy a retirement. And what happens is that when the rug is pulled on you, and you are terminated, the idea of satisfying retirement just tends to go out the window. You learn that you have to take care of that for yourself.

Senator **Shelby**. When you filed the claim with EEOC, how long was it before they told you or let you know that they weren't going to do anything?

Mr. **Lusardi**. I couldn't tell you that exactly.

Senator **SHELBY**. Did you have an ongoing relationship with them? Did they let you know the progress of the investigation or did they just stay away from you? How was it handled?

Mr. **LUSARDI**. My understanding is that they were doing nothing about it initially, and this would have been in 1982, at that time we decided that we had to take action ourselves because of certain statutes of limitations, so we did take actions ourselves. We initiated this lawsuit and then from that point on, all the correspondence and information that——

Senator **SHELBY**. But you had to do this on your own, didn't you?

Mr. **LUSARDI**. Yes, we did.

Senator **SHELBY**. In other words the agency didn't give you much encouragement, did they?

Mr. **LUSARDI**. That's right. And an individual would probably just turn around and go into the woodwork and find a job somewhere and have to take care of things for himself.

Senator **SHELBY**. Did they seem interested at all in your case, from what you gathered?

Mr. **LUSARDI**. My inclination is that at first they were not interested. That may or may not be fact. And it seemed to me that they became interested after it looked like we were starting to prove a case.

Senator **SHELBY**. This is after you had gotten in it yourself?

Mr. **LUSARDI**. Correct.

Senator **SHELBY**. Privately, right?

Mr. **LUSARDI**. That's right.

Senator **SHELBY**. In other words, up until then, as the Chairman has pointed out, and I believe the phrase he used was, lack of attention. They had not given you much attention until then?

Mr. **LUSARDI**. I would agree with that.

Senator **SHELBY**. So you had to pursue a private remedy?

Mr. **LUSARDI**. Right.

Senator **SHELBY**. Rather than EEOC doing what they were supposed to do?

Mr. **LUSARDI**. That's true.

Senator **SHELBY**. Thank you.

Mr. **LUSARDI**. Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you very much, Mr. Lusardi.

The next witness is Professor Georgiana Jungels.

Please proceed.

STATEMENT OF PROFESSOR GEORGIANA JUNGELS, ASSOCIATE PROFESSOR, STATE UNIVERSITY OF NEW YORK

Ms. **JUNGELS**. Thank you, Senator and members of the committee.

What I am going to do is give a brief chronology of my experience with EEOC, which started in 1984, and specifically in relationship to ADEA, to age discrimination, appears to abruptly have ended when 11 days before the statute of limitation ended, I was told by EEOC I would have to go into court myself to protect my rights.

What happened between 1984 and 1987? I filed four interrelated charges, three of retaliation. I filed eight administrative grievances. The documentation was clear and extensive, four file drawers and 12 notebooks to be specific. During this time I guess I should have recognized some clues that things were not going so well. For example, the very first letter I received from EEOC was addressed to "Miss Jordan." I don't know who Miss Jordan is, but clearly that is not me.

I notified the Buffalo office and they sent me a corrected letter. In that corrected letter I was told that the initial investigation would be done by the New York State Division of Human Rights and that I would be hearing from this agency in the near future. When I did not hear anything in 10 months I called the regional director of the New York Division of Human Rights and I was told that what I had been given in writing by EEOC was totally incorrect. And that, in fact, EEOC had asked the Division of Human Rights to waive their right for initial investigation so that EEOC could do it themselves.

At that point I asked the director of the Buffalo local office of EEOC two very simple questions. One, what had been done to date; and two, what would be done; and then three, assuming that they could answer those two questions, when would it be done. I was told over the phone that it was "under investigation" and while under investigation there was nothing further they could tell me. At the same time I got correspondence that clearly had incorrect charge numbers. I wrote back and gave them the correct information.

I was repeatedly told by the EEOC Buffalo office that my complaints were under investigation. When it reached the point where it was 4 months before the statute of limitation would end, I asked both Senator D'Amato's office and Senator Moynihan's office for some assistance.

They made an inquiry on my behalf and I think they were as shocked as I was by the response, which basically said that in the entire 18 months nothing had been done. For example, a request for information had been sent to my employer. They had failed to respond to this request and EEOC did eventually subpoena information, but in reality did nothing with this information because the director had resigned without notice, an investigator had resigned without notice, another person had taken sick leave without notice. And their only response to me was that they asked for my forgiveness.

I asked for a clear plan of action and what EEOC would be doing in the next 4 months prior to the end of the statute of limitation and these are the facts. I believe that EEOC's repeated delays and failure to act on my behalf gave a very clear message to my employer, and that is, "you can do as you please." For example, during this time I was assigned the highest workload of any faculty member in this entire state university system. I was injured at work when a chair broke in the classroom I was teaching in, and while I was on sick leave I received letter after letter, phone call after phone call at home, demanding that I respond immediately. All of this was reported to EEOC.

For months before the statute of limitation was to end on the age discrimination I continued to contact EEOC. I continued to ask for information and I was told that they had misplaced my file. Did I have a copy of the original charge? I made a Xerox copy of the original charge. I forwarded it to them and I asked, may I look at the file of what you have that I have given you to see if anything else has been misplaced. And I was told I was not allowed to do that. To date I do not know whether or not the thousands of pages I have submitted to the EEOC Buffalo local office are in fact in my file, or if they too have been misplaced.

Eleven days before the statute of limitation was to end I met with the director of the local regional office and I was told you must go into court yourself. There's nothing we can do on your behalf. You don't need a letter. You just go do that yourself, or you will have given up your right to equal protection under the law. I asked for a response to the same questions I had asked for 2½ years. What have you done, what will you be doing, and when will you be doing it. And I was told that it was the policy of EEOC not to respond to such questions in writing.

I, to date, have never received a response to these questions. When they lost my file, they notified Senator D'Amato's office that it had been misplaced and that they were going to do things now as expeditiously as possible. They were aware that the statute of limitation was ending on the date that it was and there was nothing further they could do.

One day before the statute of limitation ended I went down to U.S. District Court in Buffalo, NY, and with considerable assistance from the Clerk of this Court, I was advised on how to fill out the papers appropriately. I did so and filed the very last day to protect my rights. I sent a copy of what I filed to the director of the EEOC Buffalo local office. Monday morning he called me—that was the very next working day—and said, you have filed the wrong form. I said, pardon me. I filed the form that I was advised to file by the District Clerk. He said, I think it's the wrong form. I said, well, thank you for calling me and bringing this to my attention. I will call the Clerk.

I spoke with the Clerk—who I must interject, had spent an hour and a half reading through a book that was an inch and a half thick in order to advise me appropriately on how to do this pro se. I got back to him and he said, they're the only forms we have. Don't worry about it. If the Judge thinks that perhaps there's been an error in the form, he will advise you and it will be corrected.

I want to conclude with simply saying that as of today four charges and thousands of pieces of paper may or may not be in a regional office. EEOC may or may not be doing anything on my behalf on the other related charges. I was told that after the inquiry by Senator D'Amato and Senator Moynihan that my case had been given priority. I can only conclude that if my case has been given priority, and this is my chronology that no one in western New York has received any help.

These are the facts. If you want to ask any further questions, I'd be glad to answer them. What I have not addressed, and I think that it's probably what everybody recognizes and that is, what kind of toll does this take on people? I'm a college professor. I've worked for a long time. I've learned how to combine a career and four children, and I've been married for 27 years. I've learned a few things. But you can't work 7 days a week. You can't possibly constantly help somebody else do their job to enforce the law that they're supposed to enforce.

Have I been retaliated against? There's no doubt. Monday when my employer knew I was supposed to come here, I was given directives of assignment to be filled by Wednesday. I did them. Last night I was told by my immediate supervisor at 10:45 at night that unless I followed a verbal directive on the phone that night I was not to go to Washington. I got up at 4:30 this morning. I got it done. Part of that verbal directive was to contact members of my department. I called them at 7 a.m. I charged them to my credit card so there's a record, and I'm here.

If I could answer any questions, I'll be glad to.

The **CHAIRMAN**. Professor, I think your testimony is shocking, number one. There are few people that would be capable of being articulate enough and resourceful enough to pursue every avenue as you have. Yet, having pursued every avenue there's no evidence, absolutely no evidence, that the Commission is sensitive or alert or sympathetic to providing some assistance to you.

We've had a lot of failures in law, but none in my experience has been any more dramatic than the failure of the Commission to respond in a timely manner to give you some assistance. It puzzles me that having pursued every avenue, having attempted to bring to the Commission's attention an obvious complaint that ought to be assisted, that it did not result in any assistance at all prior to the time the statute of limitation ran out.

So I think we're indebted to you for presenting the most graphic and dramatic case possible of a failure of the Commission to show evidence that they are functioning. And I mean that, functioning. Not just functioning effectively, but even functioning.

Ms. **JUNGELS**. And I'm familiar with working with a large bureaucracy. I've worked for the State of New York for 17 years. I understand something about policy and procedures. I can certainly understand that individuals sometimes make errors, that things may take a little longer than expected, but I can't understand the way this has been handled. I mean I simply cannot believe such a combination of failures to do a job.

The **CHAIRMAN**. The alarming and most disappointing thing about your testimony is that you're obviously quite diligent and resourceful and persistent. The alarming part is how many other cases had there been where the individual is not quite as persistent or diligent, or knowledgeable as you.

Ms. **JUNGELS**. I've learned some of that because I have worked in the field of mental health for 20 years. I know something about advocacy on behalf of other people. I have worked in the field of geriatrics for 17 years. I never thought I would appear before this committee speaking on my own behalf. I thought I would perhaps be appearing on behalf of others. I am totally shocked by the fact that given that I do know something about how to read policies, how to follow procedures, and I have in fact done everything that needs to be done. I've consulted others. I've been assisted by Senators. As of today EEOC is simply saying that the other charges are active and under investigation. I've been told that for 2½ years.

The **CHAIRMAN**. Well, there's a lot of examples we see as Members of the Senate and our counterparts in the House see of breakdown and failures of enforcing the law. But you have, at least in my experience capped everything I've ever seen in demonstrating that the law in this case is not being enforced by the very group that has only one charge. And that is to enforce the law.

Ms. JUNGELS. That's right. And I also happen to work for an employer that has a contract that requires employees to go to an existing State or Federal Agency. My union cannot act on discrimination cases. Our contract requires us to go to an established State or Federal Agency. I've done that. My union even made an inquiry on my behalf when the EEOC told me go back to your union and ask them to do something. For approximately the 10th time I told them on the phone and in writing, please see Article 10 of our contract which clearly says that I must go to you for this assistance. My union called them, they were told that they could not discuss my case in order to protect my confidentiality.

The CHAIRMAN. Senator Heinz.

Senator HEINZ. Mr. Chairman, first I want to say this is an absolutely remarkable and tragic tale. I share your dismay with this situation.

I want to ask Ms. Jungels, the EEOC as you've indicated, called you up and said if you don't go to court by the first of August, the statute of limitation on your case, which is a 2-year statute, will have expired.

Ms. JUNGELS. That's right. To be very specific, I called them and reminded them that the statute of limitation was going to end on August 1.

Senator HEINZ. I find it extraordinary that given all the inaction by the EEOC they should have been that considerate. I was beginning to think that they had begun to wake up. But thanks for clarifying the record on that.

Could you explain to us what your understanding is of what it is that EEOC, or yourself, has to do in order for EEOC to have taken a complaint such that the statute of limitations does not expire? Most people who have EEOC complaints don't end up having to rush to court to protect, we hope, their right against the expiration of the legitimacy of their claim. What is it you understood that either you or EEOC would have had to have done in order to avoid the necessity of your having to file in court?

Ms. JUNGLES. OK.

What I was repeatedly told was that it's "under investigation." Once the investigation is completed we will either take the next action on your behalf or we will tell you what our administrative decision is and you can go to court yourself. So from the very beginning I was always told there were one of two possible things that could occur. One is that they would do something on my behalf. The other is that they would say yes, we have found evidence of discrimination and here is a right-to-sue letter.

Senator HEINZ. Did the EEOC indicate at any point that if you didn't go to court that you would be unable to pursue your claim through the EEOC? Did the EEOC claim, or did you have reason to believe that EEOC did not feel that your claim would be valid because they had not accepted it formally?

Ms. JUNGELS. No. I have letters from them saying that they have reviewed—for example, the latest retaliation charges. Basically I was disciplined for something that no other faculty member in the entire college has ever been asked to do, much less disciplined for. I filed retaliation charges. I received a letter from them indicating they had reviewed the merits of the complaint and that they were now initiating investigation and this charge is, of course, related to the other three charges.

Senator **HEINZ**. All I'm trying to establish is that they at some point did or did not acknowledge that you had filed a claim and they had accepted that filing?

Ms. **JUNGELS**. You get a form letter.

Senator **HEINZ**. Which says that we have accepted your claim?

Ms. **JUNGELS**. Which basically says, we have received your complaint, we have assigned it this number.

Senator **HEINZ**. All right.

That's all I really wanted.

Ms. **JUNGELS**. Yes, you do get that.

Senator **HEINZ**. It's theoretically possible, although given the case history date, it seems doubtful, but it's theoretically possible that EEOC could still continue to pursue your case, is it not?

Ms. **JUNGELS**. That is my understanding of what they are saying they are doing. They told me prior to the statute of limitation ending on the age discrimination case that that would end and basically their responsibility for that would end. However, it was clear that the subsequent retaliation that occurred involved age discrimination too. I very specifically asked EEOC that age discrimination be listed again too. They did not initially suggest that. They wanted simply retaliation. And I said, no, we need to be very specific. That it is retaliation, that is also related to sex discrimination and age discrimination.

Senator **HEINZ**. Well, Ms. Jungels, I want to commend you for having overcome an enormous number of hurtles, barriers, what I presume were tremendous constraints that people tried to impose upon you to prevent you from either pursuing your claim or coming here today. I commend you for your courage. These hearings couldn't take place without your willingness to come forward. And I as former chairman of this committee for 6 years, was always very proud of people like yourself who braved a lot of slings and arrows, as well as inconvenience and all the other things, to help make a record. And I express, I know, the gratitude of the Chairman as well as the other members of the committee in thanking you for being here.

Ms. **JUNGELS**. Thank you.

Based on your expertise and the information you've gathered, is there anything you would suggest that I do above and beyond what I've done to date? I can still type. I can still xerox.

Senator **HEINZ**. Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you, Senator.

Senator Shelby.

Senator **SHELBY**. Are you currently a professor at the University?

Ms. **JUNGELS**. Yes.

My current rank is Associate Professor.

Senator **SHELBY**. Do you have a Ph.D.?

Ms. **JUNGELS**. No. In my fields the terminal degree is a Master's Degree.

Senator Shelby. Is what now?

Ms. Jungels. The terminal degree in my fields is a Master's Degree.

Senator Shelby. OK.

And what field is that?

Ms. Jungels. It's the fields of Art Therapy and Art Education.

Senator Shelby. How long have you been with this university or college?

Ms. Jungels. I was hired in 1974.

Senator Shelby. Do you have tenure?

Ms. Jungels. Yes, I do. And glowing letters of recommendation.

Senator Shelby. So you're a tenured professor at this school and you currently have a joint claim, or multiple jeopardy claim?

Ms. Jungels. Yes, I do.

Senator Shelby. And that claim is based on age and sex discrimination?

Ms. Jungels. Yes.

Senator Shelby. But you have had, as you've related here, to pursue your claim yourself, haven't you?

Ms. Jungels. Yes. I'm hoping my employer will recognize this is my current area of research.

Senator Shelby. Do you see a conscious effort on the part of EEOC not to get involved? In other words, let these cases—hopefully they'll go away.

Ms. Jungels. I can't speak for other cases. Of course, I've heard some stories from other people because I chair the Affirmative Action Committee for our union on our campus. But in my own experience I would certainly say that they repeatedly told me, you can always go to court yourself.

Senator Shelby. They're trying to throw it in your lap?

Ms. Jungels. Over and over, and over again.

Senator Shelby. But they didn't offer to do it themselves?

Ms. Jungels. No, they did not.

Senator Shelby. And you filed suit in U.S. District Court in Buffalo?

Ms. Jungels. Yes, I did.

Senator Shelby. What's the current standing of your case? Is it pending in court?

Ms. Jungels. The age discrimination case—let's see. The summons and complaint, the service was completed August 19th. I received a copy of a letter from the New York State Attorney General to the Federal judge indicating they were requesting 30 days extension.

Senator Shelby. OK.

You filed these charges with the EEOC in 1984, is that correct?

Ms. Jungels. I first consulted EEOC in 1984. The first formal charge was filed with EEOC in February 1985.

Senator Shelby. And this is 1987 and it's still dragging on and you even had two U.S. Senators intervene?

Ms. Jungels. That's right.

Senator Shelby. We appreciate what Senator Heinz has said, and the Chairman, Senator Melcher. Your coming up here took a lot of courage.

Thank you.

Ms. **Jungels**. It's amazing what you learn through the process.

Senator **Shelby**. That is true.

But I see a conscious effort or design in this dragging, this inactivity, not just your case but also in the other cases presented here today.

Ms. **Jungels**. That's my understanding from reports I've heard from people. And in fact I've had people tell me they've consulted our local office and were advised not to file charges.

Senator **Shelby**. And I think we have to take into consideration that a lot of people wouldn't be as proactive as you have been, and as diligent in pursuing your rights. A lot of people wouldn't know how to proceed. So I have to think that there are thousands of cases that go unchallenged.

Ms. **Jungels**. I would think so. And in fact I know that individuals who are professional colleagues have in fact been indirectly threatened, letters in their personnel files saying things like you and your "friends". The implication was real clear.

Senator **Shelby**. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator. And thank you very much, Mrs. Jungels for your testimony.

Our next witness is Mr. Ronald Hallas. I think Senator Heinz alluded to Mr. Hallas earlier, and commented in his opening statement in regard to his particular situation.

Mr. Hallas, please proceed.

STATEMENT OF RONALD HALLAS, FORMER STEEL COMPANY EMPLOYEE

Mr. **Hallas**. I started to work for my former employer in 1947 when I was 18 years old. I started as a laborer and worked my way up into a management position. In April 1982 I was faced with a choice between a sole option pension or a less desirable job. I elected to take the job because I couldn't live on a sole option pension.

In July 1982 I was told that I would be laid off for a minimum of 60 days and that I very well may not be called back at all. The company was keeping people who were younger than I in age, plant service and corporation service. Some of them were even being trained for jobs similar to mine. The criteria used for the layoffs were supposedly service, flexibility and ratings, but all the older employees were laid off. Anyone who was eligible for, or who could walk into a pension, was laid off. At that time I had 35 years of service at that plant.

I filed an age discrimination charge in late August 1982. At that time there were at least 30 to 40 age discrimination charges on file against the company at that particular plant. I talked with the EEOC to try and get them to take these cases, but I was told that because of the heavy load and the high number of cases coming in at that time that they couldn't take them and referred to the Pennsylvania Relations Commission. Mr. Nelson, the area director of EEOC gave the same answer to Congressman Gaydos when he inquired on my behalf.

At the end of October 1982 I was notified that I was being terminated effective November 30. My supervisor said that I was one of the lucky ones, that I was to be given a 70/80 pension. At a meeting with the personnel representative I was given a form called PF-116B, which waived all my rights. My choice was sign the form and take a 70/80 pension, or don't sign and take a 2-year layoff. If I didn't take the pension, I would lose my health care benefits effective December 1. I had no choice. Even in the months when I did receive the $800 a month in unemployment compensation, that barely covered my mortgage and taxes on my home. I had used up a substantial portion of my savings. The company had you over a barrel and they knew it. There wasn't any jobs in the area.

On November 19 I went back to the EEOC and amended my charge to include retaliation because of the use of form PF-116B. As far as I know there was nothing done about that until sometime in early 1984 when the EEOC filed suit in Federal court asking for an injunction against several provisions of that form. In between 1982 and 1984 my employer had stopped paying my pension for 20 months. I was essentially put on a 2-year layoff because I had filed a retaliation charge against them. The reason I didn't believe that that form was legal was because of the nonretaliation notice that EEOC gives to employers when an employee does file a charge against them. I was very upset about that form because it said that I couldn't testify, counsel, or assist, and I didn't feel that they had a right to put a gag in my mouth.

Even though a Federal judge granted an injunction against the form in 1984, my former employer developed an almost identical form which they called PF-116C. And they started using that to intimidate people into not filing charges and to circumvent the ADEA. In the meantime, the EEOC, the Pennsylvania Human Relations Commission and my employer agreed to a summary judgment on that form. A new judge turned it over to a district magistrate. In mid-August 1987 he submitted his recommendations which ruled against my former employer but the judge has not yet acted on it. There are people, including myself, still suffering as a result of that form. And I have yet to receive the 20 months of pension back yet.

After I heard about another case where the court ruled that denying older employees severance pay because they were eligible for a pension was willful age discrimination, I amended my charge with the EEOC, but to my knowledge they have not pursued that matter.

And I would hope that somehow you can make some kind of law that says corporations cannot put an employee in the position that they put me in. You know, you have to take care of your family. You have to pay your mortgage. You have to eat. You have to take care of what you've worked a lifetime for, so you sign the waiver.

[The prepared statement and related documents of Mr. Hallas follow:]

1575 Fallen Timber Road
Elizabeth, PA 15037
October 5, 1987

Senator John Melcher
United States Senate
Special Committee on Aging
Washington, D.C. 20510-8400

Dear Senator Melcher:

Enclosed are letters and documents I hope can be made a part of the record. I believe they show the results of un-supervised waivers on ordinary individuals like myself and how one is coerced into signing one. Also, a letter to Congressman Gaydos from Eugene Nelson, Area Director of the E.E.O.C. refusing my plea for help from the E.E.O.C. for myself and the other foremen who had filed charges with the E.E.O.C. is enclosed. In addition a copy of a Federal Magistrate's Report and Recommendations on the use of PF116B and PF116C is enclosed.

Thank you.

Sincerely,

Ronald I. Hallas

UNITED STATES STEEL AND CARNEGIE PENSION FUND

Application and Release
For 70/80 Retirement Under Mutually Satisfactory Conditions

1. I, RONALD I. HALLAS, Social Security No. 185-22-5150, hereby request retirement on 70/80 retirement under mutually satisfactory conditions in accordance with the provisions of the Part II-J Non-Contributory Pension Rules and the Part IV-F Contributory Pension Rules.

2. I request that my retirement be made effective 11-30-82.

3. I understand that in exchange for United States Steel Corporation's agreeing to my retirement on 70/80 retirement under mutually satisfactory conditions and thus paying me a special early retirement pension to which I would not otherwise be entitled, I must release United States Steel Corporation from any claims in connection with my employment as set forth in paragraph 4 below and make the commitments set forth in paragraphs 4, 5 and 6 below. I freely make this exchange, having read this application and release, and having determined to be legally bound by the same.

4. As consideration for United States Steel Corporation's approval of my request for 70/80 retirement under mutually satisfactory conditions, I hereby irrevocably and unconditionally release, remit, acquit and discharge United States Steel Corporation, its past and present shareholders, subsidiaries, divisions, officers, directors, agents, employees, successors and assigns (separately and collectively "releasees"), jointly and individually, from any and all claims, known or unknown, which I, my heirs, successors or assigns have or may have against releasees and any and all liability which the releasees may have to me whether called claims, demands, causes of action, obligations, damages or liabilities arising from any and all bases, however called, including but not limited to claims of discrimination under any federal, state or local law, rule or regulation. This release relates to claims arising from and during employment or as a result of termination, whether those claims are past or present, whether they arise from common law or statute, whether they arise from labor laws or discrimination laws, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, or any other law, rule or regulation. This release is for any relief, no matter how called, including but not limited to wages, backpay, frontpay, compensatory damages, punitive damages or damages for pain or suffering. Further, I agree I will not file or permit to be filed on my behalf any such claim. I also agree that I will not permit myself to be a member of any class seeking relief and will not counsel or assist in the prosecution of claims against the releasees, whether those claims are on behalf of myself or others. If any such claim has been filed by me, or includes me in its coverage for relief, I agree to voluntarily withdraw such claim and otherwise agree not to participate in such claim.

5. In the event that I should breach any of the obligations set forth in paragraph 3 above, I agree to repay the United States Steel and Carnegie Pension Fund an amount equal to the total of all pension benefits paid to me and all insurance claims paid on my behalf or on behalf of my dependents from the date specified in paragraph 2 onwards with interest at the rate of one-half of one percent per month; provided, however, that if I were eligible for thirty (30) year sole option retirement at the time of my 70/80 retirement, my 70/80 retirement will be converted retroactively (or, in legal terms, nunc pro tunc) to a thirty (30) year sole option retirement and I will be required to repay to the United States Steel and Carnegie Pension Fund the difference between the pension amount paid to me and the pension amount which would have been paid to me had I retired on thirty (30) year sole option retirement with interest at the rate of one-half of one percent per month.

6. In addition to the above, I hereby appoint the General Counsel-United States Steel Corporation (and his designees) as my attorney and authorize him (and his designees) to appear on my behalf and dismiss any action filed by me, withdraw any charge filed by me or to take any action appropriate to effectuate the commitments made by me in paragraph 3.

Robert C. Yost Jr	11-29-82	Ronald Hallas
Signature of Witness	Date	Signature of Applicant

UNITED STATES STEEL AND CARNEGIE PENSION FUND
Application and Release
For 70/80 Retirement under Mutually Satisfactory Conditions

1. I, ______________, Social Security No.______________ hereby request 70/80 retirement under mutually satisfactory conditions in accordance with the provisions of the Part II-J Non-Contributory Pension Rules and the Part IV-F Contributory Pension Rules.

2. I request that my retirement be made effective ____________.

3. IN EXCHANGE FOR THE UNITED STATES STEEL CORPORATION'S AGREEING IN GOOD FAITH TO MY 70/80 RETIREMENT UNDER MUTUALLY SATISFACTORY CONDITIONS AND THUS PAYING ME A SPECIAL EARLY RETIREMENT PENSION AND OTHER BENEFITS TO WHICH I WOULD NOT OTHERWISE BE ENTITLED, I HEREBY, OF MY OWN FREE WILL AND IN GOOD FAITH, COMPLETELY RELEASE UNITED STATES STEEL CORPORATION FROM ANY CLAIMS IN CONNECTION WITH MY EMPLOYMENT AS SET FORTH IN PARAGRAPH 4. BELOW.

4. As consideration for United States Steel Corporation's approval of my request for 70/80 retirement under mutually satisfactory conditions, I hereby irrevocably and unconditionally release, remit, acquit and discharge the "Company", jointly and individually, from any and all claims, known or unknown, which I, my heirs, successors or assigns have or may have against the Company and any and all liability which the Company may have to me arising from any and all bases, however called, including but not limited to claims of discrimination under any federal, state or local law, rule or regulation. The "Company" means separately and collectively United States Steel Corporation, its past and present shareholders, subsidiaries, divisions, officers, directors, agents, employees, successors and assignees. This Application and Release relates to claims arising from and during employment or as a result of termination, whether those claims are past or present, whether they arise from common law or statute, whether they arise from labor laws or discrimination laws, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, or any other law, rule or regulation. This Application and Release is for any relief, no matter how called, including but not limited to wages, backpay, frontpay, compensatory damages, punitive damages or damages for pain or suffering. Further, I agree I will not file or permit to be filed on my behalf any such claim. If any such claim has been filed by me, or includes me in its coverage for relief, I agree to voluntarily withdraw such claim and otherwise agree not to participate in such claim.

5. In the event that I should breach any of the obligations set forth in paragraphs 3 and 4 above, I agree to repay the United States Steel and Carnegie Pension Fund an amount equal to the total of all pension benefits paid to me and all insurance claims paid on my behalf or on behalf of my dependents from the date specified in paragraph 2 onwards with interest at the rate of one-half of one percent per month. However, if I were eligible for sole option retirement [thirty (30) year or 60/15] at the time of my 70/80 retirement, my 70/80 retirement will be converted retroactively (in legal terms, nunc pro tunc) to a sole option retirement. In that event I will be required to repay to the United States Steel and Carnegie Pension Fund the difference between the pension amount paid to me and the pension amount which would have been paid to me had I retired on a sole option retirement plus interest at the rate of one-half of one percent per month.

6. I retain my right to invoke the disputes provision of the United States Steel Corporation Plan for Employee Pension Benefits (Revision of 1950) with respect to any matter covered by the disputes procedure and to file claims for workers' compensation.

- - - - -

THIS IS A RELEASE. READ IT CAREFULLY. YOUR EXECUTION OF THIS RELEASE WAIVES YOUR RIGHT TO PURSUE RELATED LEGAL CLAIMS, INCLUDING YOUR RIGHT TO CHALLENGE THE TERMINATION OF YOUR EMPLOYMENT. IF YOU HAVE ANY QUESTIONS CONCERNING THIS RELEASE, YOU ARE FREE TO CONSULT AN ATTORNEY PRIOR TO SIGNING.

- - - - -

I freely make the commitments set forth above and make this exchange, having read this Application and Release and the attached Explanation of Pension Benefits. I agree to be legally bound by this Application and Release --- except that if, after review, I wish to revoke this enhanced retirement arrangement and to pursue other claims, I may do so provided that within thirty days of the date shown below I give written notice of such revocation to the Company representative identified below.

Signature of Company Representative	Date	Signature of Applicant

attachment
PF-116-C

PLEASE READ THIS CAREFULLY

EXPLANATION OF PENSION BENEFITS

NON-UNION EMPLOYEES

In the event that employment of an individual is terminated prior to attainment of age 62 due to a job elimination (other than job elimination due to a permanent shutdown) or inability to perform the full scope of his/her job due to medical conditions, and the individual is not offered other employment as defined by the Non-Contributory Pension Rules, the individual has the following rights under the pension plan, depending on age and/or length of service:

Years of Service	Non-Contributory Pension Eligibility
Less than 10	no pension entitlement
10-but less than 20 (age & service do not satisfy 70/80 criteria)	deferred vested pension payable in full at age 65; payable in full at age 62 if employee is over 40 and has more than 15 years of service
20 or more as of the last day worked & age & service equal 65 or more and employee does not satisfy 70/80 criteria	Rule of 65 pension payable only after two years of layoff
30 or more	30-year sole option pension payable immediately
15 or more & employee has attained age 60	60/15 sole option actuarially reduced pension payable immediately
Age & service satisfy 70/80 criteria (70--age 55 or older plus 15 or more years of service; 80--age and service equal 80 or more)	70/80 pension payable only after two years of layoff

(The foregoing represents a general explanation of pension eligibility and is not intended to modify or change the Non-Contributory Pension Rules which remain the governing document.)

The above table sets forth the only pensions to which such a laid off employee may be entitled to as a matter of right. Significantly, none of the pensions described in the Table provide both immediate payment and a $400 supplement. Sole option retirement provides for immediate payment but does not include a $400 supplement. Rule of 65 and 70/80 pensions described above include a $400 supplement but do not provide for any payment until after two years of layoff.

U. S. Steel may, at its discretion, offer, under certain conditions, a pension to eligible employees which includes both an immediate payment and a $400 supplement. This pension is a 70/80 pension under mutually satisfactory conditions.

Advantages of immediate 70/80 pension compared to 70/80 pension after two-year service break due to layoff

- An employee who accepts a company offer of a 70/80 pension under mutually satisfactory conditions concurrent with the last day worked receives the following advantages: (a) he receives pension and a $400 supplement for the two years during which the laid off employee receives no income from the Company, (b) he has medical insurance coverage (under the retiree program) for that two years while the laid off employee receives medical insurance coverage (under the active employee program) for only one year.

Advantages of immediate 70/80 pension compared to 30-year sole option retirement

- An employee who accepts a Company offer of a 70/80 retirement under mutually satisfactory conditions receives the following advantages: (a) he receives the $400 supplement until attainment of eligibility for Social Security (normally age 62); (b) if less than age 58, his contributory pension is subject to a lesser reduction because of early commencement and (c) his life insurance is not reduced until age 62 versus immediate reduction for sole option retirement.

A 70/80 retirement under mutually satisfactory conditions is, as the name implies, a pension granted under conditions mutually satisfactory to both U. S. Steel Corporation and the employee. U. S. Steel cannot force any employee to take such a pension. Neither can any employee force U. S. Steel to grant him such a pension. This pension is a mutual pension, i.e., both the company and the employee must agree to such retirement. U. S. Steel does not consider any 70/80 retirement to be satisfactory to it unless the employee executes Form PF-116-C and relinquishes the right to institute certain legal claims as defined on Form PF-1[illegible]

NO EMPLOYEE SHOULD SIGN [illegible] PF-116-C [illegible] CONSIDERS HIS TERMINATION OF EMPLOYMENT UNACCEPTABLE [illegible] ACTION AGAINST U. S. STEEL RELATIVE TO HIS TERMINATIO[illegible] THE EMPLOYEE DOES NOT UNDERSTAND THE ISSUES INVOLVED AND/OR IS IN DOU[illegible] IS FREE TO CONSULT AN ATTORNEY.

10-29-82

10-28-82

STATUS - ACTIVE OR L.U.B. TO PERMANENT TERMINATION

As a result of a permanent management force reduction your active employment is being terminated effective November 30, 1982.

You will be entitled to the benefits as described in the Severance Pay Program for Management Employees (Rev. May 1, 1982).

If your combined age and service otherwise qualifies you for a retirement under 70/80 mutually satisfactory conditions, a recommendation will be submitted for such a retirement. Make arrangements with the Employment Office as soon as possible to discuss your benefits and option elections.

If you are not eligible for an immediate pension the option elections regarding (1) two year layoff or (2) acceptance of severance pay, will be available to you. Employee Benefits will provide an explanation of all attendant benefits for each election option.

- -

NOTICE TO EMPLOYEE: BE SURE YOU HAVE READ AND FULLY UNDERSTAND THIS DOCUMENT.

ELECTION AND ACKNOWLEDGEMENT OF EMPLOYEE CONCERNING 70/80 RETIREMENT OR LAYOFF
EXEMPT EMPLOYEE

In connection with my active employment ceasing on 11-30-82, I understand that one of two options is available to me, namely:

A. To elect to retire as of such date with a 70/80 retirement pension,

B. To elect to be placed in layoff status (without pay) with the understanding that I may retire at a later date with a 70/80 retirement pension if I do not receive a reasonable offer of employment prior to retirement.

The effect of my exercise of either of the above options has been explained to me in detail.

A. I, RONALD I. HALLAS, hereby elect to retire on a 70/80 pension and thereby to terminate my employment and continuous service for all purposes as of 11-30-82.

Ronald I. Hallas
Employee Signature

11-11-82
Date Signed

B. I, RONALD I. HALLAS, hereby elect to be placed in layoff status (without pay) with the understanding that, if I do not receive a reasonable offer of employment prior to the date of my retirement, I will be eligible for a 70/80 retirement pension.

I further understand that if I refuse a reasonable offer of employment prior to said date, my continuous service will be regarded as having been broken by reason of such refusal, as of the date of such refusal, and I will not be eligible for non-vested Company contributions in the Savings Fund Plan, continuation of insurance coverage, a pro rata special vacation allowance or a 70/80 retirement pension.

Employee Signature

Date Signed

WITNESS:
Company Representative

JOSEPH M. GAYDOS
20TH DISTRICT, PENNSYLVANIA

COMMITTEES:
EDUCATION AND LABOR
CHAIRMAN:
SUBCOMMITTEE ON HEALTH AND SAFETY

HOUSE ADMINISTRATION
CHAIRMAN:
SUBCOMMITTEE ON CONTRACTS AND PRINTING

Congress of the United States
House of Representatives
Washington, D.C. 20515

2368 Rayburn House Office Building
Washington, D.C. 20515
(202) 225-4631

District Office:
1514 Lincoln Way
White Oak
McKeesport, Pennsylvania 15131
(412) 644-2896
(412) 673-7756

November 9, 1982

Mr. Ronald I. Hallas
1575 Fallen Timber Road
Elizabeth, PA 15037

Dear Mr. Hallas:

Enclosed is a letter I have received from the Equal Employment Opportunity Commission in response to my inquiry on your behalf.

I believe you will find the contents of the enclosed communication self-explanatory; however, should you desire any additional information, please feel free to contact me.

With kindest regards, I remain

Sincerely yours,

Joe Gaydos
JOSEPH M. GAYDOS, M. C.

JMG:ws

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PITTSBURGH AREA OFFICE
1000 LIBERTY AVENUE
ROOM 2038 A
PITTSBURGH, PENNSYLVANIA 15222

November 4, 1982

Honorable Joseph M. Gaydos
Representative, United States Congress
1514 Lincoln Way
White Oak Borough
McKessport, Pennsylvania 15131

Dear Congressman Gaydos:

Our records indicate that Mr. Hallas and a number of other foremen at the U. S. Steel Clairton Works filed charges in which they allege that the criteria used by the U. S. Steel Company to decide who would be laid off was age based.

In accordance with our established procedures, these charges were sent to the Pennsylvania Human Relations Commission to be investigated and resolved. We have contracted with the Pennsylvania Human Relations Commission to perform conciliations and investigations under both Title VII of the Civil Rights Act of 1964, as amended, as well as the Age Discrimination Act of 1967. In this way we are able to accomplish our Congressional mission more expeditiously.

Mr. Hallas has been advised of his right to initiate a lawsuit in the Federal District Court to vindicate his rights in this matter if he is dissatisfied with the results of the Administrative Agencies' efforts or 60 days after he filed his charge without waiting if he so desires.

As you probably know, this area leads the nation in the number of Age complaints received primarily because of the deplorable condition of the economy in general and the steel industry in particular. The resultant layoffs that have occurred have flooded this office with charges of age discrimination. Mr. Hallas' request for priority for his charges simply could not be met in fairness to the myriad of others who filed similar charges before him and who also are suffering from severe economic loss.

The clear intent of Congress was that individuals such as Mr. Hallas should not have to wait for the Administrative Agency to process their charges and so it provided them with a ready mechanism to bring their claim to the judiciary.

We appreciate your continuing interest in the work of our Agency.

Sincerely,

Eugene V. Nelson
Area Director

cc: EEOC, Office of Congressional Affairs
Washington, D. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

1527
Mitchell

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION)
Plaintiff)
)
v.) Civil Action No. 84-702
)
)
UNITED STATES STEEL)
CORPORATION,)
Defendant)

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MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that EEOC and plaintiff intervenor Pennsylvania Human Relations Commission's motion for partial summary judgment be granted and that defendant United States Steel's motion for summary judgment be denied.

It is further recommended that the defendant United States Steel, its officers, agents, employees and all other persons acting in concert with them or on their behalf, be permanently enjoined from terminating or reclassifying the 70/80 retirement pension with respect to any individual who has filed a charge or claim under the ADEA with the EEOC or in judicial proceedings or on whose behalf such a charge or claim has been filed, or who has assisted, participated, or cooperated in the EEOC's investigation and prosecution of charges or claims under the ADEA.

It is further recommended that the defendant United States Steel, its officers, agents, employees, and all other persons acting in concert with them or on their behalf be permanently enjoined from requiring employees to sign Form PF-116-B or PF-116-C in order to be eligible for a 70/80 retirement under mutually satisfactory conditions.

It is further recommended that the defendant United States Steel, its officers, agents, employees and all other persons acting in concert with them or on their behalf be enjoined from the continued withholding of pension benefits of individuals whose 70/80 retirement has been terminated or reclassified because they filed or permitted to be filed on their behalf a charge or claim under the ADEA or counselled or assisted in the prosecution of such claims on their behalf or on the behalf of others, and that United States Steel remit to such individuals pension benefits withheld as a result of such classification or termination in amounts to be established in further proceedings.

II. Report

Plaintiff Equal Employment Opportunity Commission ("EEOC") has brought this action against the United States Steel Corporation ("USS") alleging that USS was and is engaging in employment practices that violate section 4(d) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(d), by requiring certain employees to sign a release of rights under the ADEA in order to obtain a pension plan known as a 70/80 retirement under mutually satisfactory conditions. The EEOC is authorized to bring this action pursuant to §7(b) of the ADEA, 29 U.S.C. §626(b), and §§16 and 17 of the Fair Labor Standards Act ("FLSA"), 19 U.S.C. §§216 and 217. Jurisdiction is invoked pursuant to 28 U.S.C. §§1337, 1343, and 1345. Presently before the Court for disposition are EEOC and plaintiff intervenor Pennsylvania Human Relations Commission's motions for partial summary judgment and USS's motion for summary judgment.

A. Factual and Procedural Background

USS's 70/80 retirment is one of several pension plans available to USS employees who are participants in the United States Steel Corporation Plan for Employee Pension Benefits (Revision of 1950) (the "Plan"). Essentially the 70/80 is a special early retirement pension that provides more lucrative benefits to a retiring employee than do the standard retirement plans available to participants. [1] To be eligible for a 70/80 retirement, an employee must meet certain age and service requirements [2] and fall into one of several specified categories, including the one involved here "under mutually satisfactory conditions." According to the Plan's governing rules, a 70/80 retirement under mutually satisfactory conditions is granted to an employee "who considers that it would be in his interest to retire and his Employing Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions."

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[1] USS has estimated that the present value of a 70/80 retirement in the case of a 55 year old employee is $109,000 (Magistri Affidavit ¶ 6).

[2] An employee must have at least 15 years of continuous service, be under 62 years of age, and either have attained the age of 55 years and have a combined age and years of continued service equal to 70 or more or have a combined age and years of continuous service equal to 80 or more.

United States Steel 1980 Non-Contributory Pension Rules, section 2.6(a)(4) (Exhibit A to the Affidavit of C.E. Magistri attached to USS's Motion for Summary Judgment). Unlike most of the pension plans available to eligible participants, a retiring employee may not unilaterally compel USS to grant 70/80 retirement under mutually satisfactory conditions. Rather, the grant of this pension is within the sole discretion of the company, which must approve an application for the pension. According to USS, the plan has been historically granted to management employees whose jobs have been eliminated in USS's long efforts to reduce management work forces in order to deal with the business conditions that have afflicted the declining American steel industry. An application for the plan is typically granted where both USS and the employee are satisfied with the circumstances surrounding the early retirement. Hence the mutuality of the plan -- the company benefits by reason of the employee's hassle-free early departure and the employee benefits by receiving an early and more lucrative pension plan than he would otherwise have been entitled to receive.

In the late 1970's and early 1980's, the managment at USS discovered that certain employees who had been granted the 70/80 retirement under mutually satisfactory conditions had subsequently filed age discrimination charges against USS claiming that their termination had been improper. The management at USS felt that this defeated the very purpose of the 70/80 since this special pension plan was supposedly granted to employees who were satisfied with the expanded conditions of their retirement from the company and who had tacitly agreed that by applying for the 70/80 and retiring early, they would not bring legal action concerning their retirement from the company. This development led the USS management to develop a proposal requiring all employees requesting a 70/80 retirement under mutually satisfactory conditions to release all claims against USS related to their employment and termination. This proposal was adopted by the Special Committee of the USS Board of Directors, which determined that effective October 1, 1982 all management employees of USS who desired the 70/80 retirement would be required sign a general release known as Form PF-116-B.

Form PF-116-B, entitled "Application and Release for 70/80 Retirement Under Mutually Satisfactory Conditions," contains a release or waiver of all claims and causes of action under, inter *alia*, the ADEA. [3] The Form also sets forth a promise by the employee/signatory (1) not to file or permit to be filed on his or her behalf any claim under the ADEA; (2) not to counsel or assist in the prosecution of such claim whether on his behalf or on the behalf of others; and (3) to withdraw any such claim filed by the employee/signatory or by others on his or her behalf and to not participate in such claim. The form also provides for certain penalties against individuals who breach their obligations under the release, including repayment of any benefits received plus interest and a conversion of the employee's retirment from the 70/80 to the less desirable standard retirement plan. Prior to October 1, 1982, the release and waiver contained in Form PF-116-B were not required in order to obtain a 70/80 retirement pension.

The EEOC commenced the instant action on March 3, 1984 alleging that USS was and is willfully engaging in employment practices that violate the ADEA by requiring employees to sign the PF-116-B in order to obtain a 70/80 retirement. The complaint further alleged that use of the release would have the effect of "precluding, discouraging and intimidating employees or former employees from filing charges, testifying, assisting or participating in any manner in an investigation, proceeding or litigation under the ADEA or in any manner opposing any practice made unlawful by the ADEA" and that it further would "prevent or hinder the [EEOC] from accomplishing its Congressional mandate of investigating and/or prosecuting alleged acts of discrimination." (Complaint ¶ 8). The complaint seeks a permanent injunction to enjoin USS from requiring employees to sign Form PF-116-B in order to be eligible for a 70/80 retirement; from denying benefits under the 70/80 to employees who have filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under the ADEA; and from reclassifying the pensions of those individuals who have opposed practices made unlawful by the ADEA or filed a charge. (Complaint Prayer for Relief ¶B). The complaint also seeks a judgment against USS under which USS would be required to pay appropriate back wages in the amount of the withheld pension benefits and an equal sum as liquidated damages to those persons whose 70/80 pensions have been reclassified because of their actions. Finally, the complaint seeks to enjoin USS from continuing to withhold amounts owing to these individuals. (Complaint Prayer for Relief ¶¶C and D).

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[3] The form also contains a waiver and release of rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, as well as under all state and federal causes of action relating to the conditions of the employee's termination. However, these provisions are not challenged in the instant action, and the subsequent discussion will be limited to the applicability of the form to the ADEA.

Simultaneously with filing the complaint, the EEOC requested a Temporary Restraining Order, contending that USS's use and enforcement of the release was causing irreparable harm to the EEOC's investigative and administrative processes. Based upon the motion, an evidentiary hearing, and the briefs and arguments of the parties, the Court on March 28, 1984 issued a TRO restraining USS from enforcing certain portions of the release and also restraining USS from terminating the 70/80 retirement with respect to certain individuals who filed charges or claims under the ADEA or who participated in the EEOC's investigation of charges or claims under the ADEA (Docket entry 7).

A hearing on the EEOC's motion for a preliminary injunction was held on April 4, 1984 at which several individuals who had signed the PF-116-B testified. The Court found that a number of those individuals had filed charges with the EEOC concerning their layoffs or retirements before they were required to sign the PF-116-B. One of these individuals had also filed an action in federal district court. The Court further found, however, that some individuals had not filed any charges nor joined any lawsuits at the time they signed the PF-116-B. The Court also found that only with respect to one individual did the evidence suggest that execution of the PF-116-B was part of a settlement or compromise of a claim. In reviewing the circumstances under which the individuals were given the PF-116-B to sign, the Court concluded that "[i]n light of all the factors discussed above, namely, lack of negotiations, absence of counsel, lack of explanation with respect to the release and the ambiguity in the language of the release, we hold that the employees' consents to the alleged "settlements" were not voluntary and knowing even assuming that the facts could support the existence of "settlements." Opinion at 8 (docket entry 10) Finally, the Court found that the use and enforcement of PF-116-B would cause irreparable harm to the EEOC in that the use of PF-116-B has and would continue to hinder and impede "EEOC's investigative and administrative processes by having a 'chilling' effect on those who have filed charges as well as on those who have not and will continue to do so . . ." Opinion at 9. Accordingly, the Court granted the EEOC's motion for a preliminary injunction by Order of April 6, 1984 (docket entry 10).

Effective June 1, 1984, subsequent to the commencement of this action, USS replaced Form PF-116-B with Form PF-116-C. Like the PF-116-B, the PF-116-C is a prerequisite to obtaining a 70/80 retirement under mutually satisfactorily conditions and contains a release and waiver by the signatory of all claims under the ADEA as well as promises by the signatory not to file or permit to be filed any claim on his behalf, to voluntarily withdraw any such claim already filed, and to not participate in such claim. Unlike the PF-116-B, however, the new form does not contain a promise by the signatory not to counsel or assist in the prosecution of any claim. The PF-116-C also provides that the applicant may revoke his application at any time during a thirty day period following the date he signs the application. The new form also has an attachment that provides an explanation of available pension benefits, including an explanation of the conditions attached to the 70/80 retirement under mutually satisfactory conditions. Both the PF-116-C and the attachment contain in bold-faced type a statement that by signing the form the retiree waives certain legal rights and that an employee who does not understand the issues involved is free to consult an attorney. USS has notified the Court that it developed the PF-116-C in order to address certain of the problems raised by the EEOC in this action and that although it is utilizing the PF-116-C, it recognizes that the provisions of the preliminary injunction apply to the PF-116-C as well as the PF-116-B.

The EEOC and plaintiff-intervenor Pennsylvania Human Relations Commission have now filed a motion for partial summary judgment seeking judgment on the issue of liability and reserving the issue of damages for future proceedings. [4] USS has filed a cross motion for summary judgment. Summary judgment is appropriate where the pleadings and discovery material, together with any affidavits, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); _Tigg_ v. _Dow_, F.2d (3d Cir. 1987). In support of its present motion, the EEOC relies primarily on the testimony and exhibits offered at

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4. In its motion for partial summary judgment the Pennsylvania Human Relations Commission relies on the briefs and arguments submitted by the EEOC, and has submitted no additional material.

the hearing held on its motion for a preliminary injunction, as well as on several depositions. In support of its motion and in opposition to EEOC's motion, USS has submitted several affidavits, discovery material, and other relevant documentary material. USS also relies on the testimony and exhibits offered at the preliminary injunction hearing.

B. Discussion

It should be noted at the outset that the EEOC makes no claim of age discrimination in this case. That is, the EEOC is not contending, at least in this action, that USS unlawfully terminated the employees who signed the PF-116-B on the basis of age in violation of the central prohibitory section of the ADEA, §4(a). [5] Rather, the central thrust of the EEOC's claim is that USS's use and enforcement of the PF-116-B and PF-116-C is in violation of the ADEA in that requiring employees to sign a waiver of rights under the ADEA in order to receive a 70/80 pension is impermissible, and further, that the additional provisions contained in these agreements deter individuals from filing charges or otherwise opposing practices made unlawful by the ADEA, as well as hindering the EEOC from performing its Congressionally mandated duty to enforce the provisions of the ADEA. Thus, the EEOC seeks no damages on any individual's behalf for age discrimination, but only to enjoin USS's future use of the PF-116-B/C as a prerequisite to obtaining a 70/80 pension and to have USS restore the 70/80's of these individual's whose pensions have been reclassified for violating the provisions of the forms. In order to resolve the EEOC's claim for relief, it would be appropriate, for purposes of clarity, to address separately the validity of each of the challenged provisions contained in the PF-116-B/C.

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[5] §4(a), 29 §623(a), provides:

> It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

1. Validity of the Release and Waiver of Rights under the ADEA

In support of its challenge to the validity of requiring employees to sign a waiver and release of rights under the ADEA in order to be eligible for a 70/80 pension, the EEOC argues first, that waivers of rights under the ADEA are per se invalid because of the ADEA's incorporation of the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. §201 et seq.; second, that the waivers in this case are inoperative as impermissible prospective waivers of rights; and finally, that the waivers in this case were not made in a knowing and involuntary manner. Despite the extensive arguments made by both parties on this issue, it is not necessary to address this issue in order to resolve the EEOC's claim for relief in this case.

Ordinarily, the issue of the validity of a waiver of rights under the ADEA arises where an individual, or the EEOC on behalf of an individual, brings an action alleging unlawful age discrimination by an employer, the employer raises a waiver of rights under the ADEA by the individual as a defense, and the individual, or EEOC, asserts that the waiver cannot serve as a bar to the age discrimination claim for one of several reasons. See, for example, Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982); Runyan v. NCR Corp., 573 F.Supp. 1454 (S.D.Ohio 1983), affirmed 787 F.2d 1039 (6th Cir. 1986) (en banc); Campbell v. Connelie, 542 F.Supp. 275 (N.D.N.Y. 1982); Karten v. New York University, 464 F.Supp. 704 (S.D.N.Y. 1979). However, as discussed, the EEOC makes no claim of age discrimination in this case. The EEOC nevertheless has gone to great lengths to argue against the validity of the waivers, under the assumption that the waiver provision itself must be found invalid in order to enjoin the enforcement of the additional provisions. However, as will be discussed infra, these additional provisions are invalid and should be enjoined regardless of the validity of the waiver of rights itself. Therefore, it is unnecessary to resolve the issue of whether the waiver of rights under the ADEA is valid.

2. Validity of the Counsel or Assist Provision

As discussed, in addition to the waiver of rights provision, the PF-116-B contains a promise by the signatory not to "counsel or assist" in the prosecution of claims under the ADEA whether on their behalf or on the behalf of others. The EEOC maintains that this provision discourages signatories from testifying, assisting, or otherwise participating in any proceeding under the ADEA as well as hindering the EEOC from performing its obligation to enforce the ADEA. Indeed, at the hearing held on EEOC's motion for a preliminary injunction, evidence was presented that this provision had such a chilling effect. It is submitted, however, that this provision is per se invalid regardless of whether the EEOC can show that it has in fact had such a deterrent effect.

The EEOC contends that the provision at issue is in violation of §4(d) of the ADEA, 29 U.S.C. §623(d), which provides in pertinent part:

> "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

Certainly, reclassifying a retiree's pension for counseling or assisting in the prosecution of ADEA claims constitutes discrimination against an individual who has "opposed any practice made unlawful" by the ADEA or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]." Although it can be argued that a retiree is not an "employee" under §4(d) in that he is no longer employed by the company when the retaliatory conduct occurs, the individual was such an employee when required to sign the PF-116-B and thus the seeds for subsequent retaliation were planted while the individual was employed by the company. Moreover, the practice challenged by the EEOC is USS's requirement that an employee sign the "counsel or assist" provision -- an event that occurs at a time the individual is an employee. In any event, the "counsel or assist" provision is inconsistent with the apparent policy behind §4(d), namely to allow aggrieved individuals to enforce the provisions of the ADEA without fear of reprisal or retaliation.

USS has maintained throughout this action that it did not intend for the "counsel or assist" provision to have such far reaching effects. Specifically, USS contends that under its interpretation, the PF-116-B does not preclude a signatory from talking to the EEOC or from testifying in court. However, as the Court noted in the Opinion of April 6, 1984, this language is not free from ambiguity, and it could be interpreted by a signatory as prohibiting him from giving any assistance to the EEOC. The mere possibility that this provision would deter individuals from participating in any ADEA claims is sufficient to render it violative of §4(d) and public policy. See Wolf v. J.I. Case Company, 617 F. Supp. 858, 867-869 (E.D. Wis.) (discussing Title VII's nearly identical anti-retaliation provision).

In short, whether under the express provisions of §4(d) or as contrary to public policy, the "counsel or assist" provision is invalid and USS should be enjoined from enforcing it. Even assuming that the waiver of rights requirement itself is valid, this provision goes further by potentially prohibiting signatories from participating in an ADEA claim in any manner even if the claim is brought on behalf of another individual. Even if this provision was entered into in a knowing and voluntary manner by an individual, USS would not actually be prejudiced by enjoining its enforcement since it would still be able to assert the waiver as a defense to any age discrimination brought by an individual or the EEOC. However, if this additional provision is permitted to stand, the individual might be deterred from even discussing his situtation with the EEOC in the first instance for fear his pension would be reclassified. Thus, USS should be enjoined from using this provision in the future and from enforcing its terms against individuals who have already signed the form.

3. Validity of the Charge or Claim Provision

Both the PF-116-B and PF-116-C contain a promise by the signatory not to file a charge or claim under the ADEA. In the typical situation where an individual makes a waiver or release of rights under some statutory or common law cause of action, an additional promise not to file a claim is essentially irrelevant. That is, no harm will accrue to the individual if he does assert such a claim although the defendant will certainly raise the waiver as a defense to that action. In the instant case, however, harm will accrue to the signatory merely by filing a charge with the EEOC, or an action in court, in that upon the filing of the charge or claim his pension will be immediately reclassified and any enhanced pension benefits received would have to be returned. Thus, this provision, as the counsel or assist provision, has the potential of deterring individuals from participating in ADEA claims. Again, it should be noted that USS may still assert a signatory's waiver of rights as a defense to an age discriminatin claim. However, if an individual is deterred from bringing such an action in the first instance, the validity of the waiver of rights will not be able to be determined. Thus, USS should be enjoined from enforcing this provision as well as the counsel or assist provision.

4. Validity of the Withdrawal Provision

The forms also contain a promise by the signatory to withdraw any ADEA claims already filed and to not participate in any claim already filed on his behalf. Apparently this provision is included because the forms are used as a condition for the 70/80 retirement in situations where a signatory has a pending charge or claim against USS. Thus, it is conceivable that the use of the form may be part of a valid settlement. Once again, however, USS may raise such a settlement as a defense to such a claim brought under the ADEA, and a determination of the validity of the settlement may be determined in that context. Further, as already discussed, it is per se invalid to prohibit a signatory from participating in any ADEA brought on his behalf. For these reasons, the provisions of any injunctive relief should apply to signatories who had claims or charges pending at the time they signed the forms as well as to those who brought such charges or claims subsequent to signing the forms.

C. Conclusion

The EEOC has brought this action because of the actual and potential effect certain provisions contained in the PF-116-B and PF-116-C have in deterring individuals from filing charges or claims under the ADEA or otherwise participating in ADEA claims, which in turn hinders the EEOC's investigative and enforcement mandate. In order to enjoin the enforcement of these provisions, the EEOC has argued extensively against the validity of requiring a waiver of rights under the ADEA in order to receive a 70/80 retirement. However, the issue of the validity of the waiver should be appropriately decided where such waiver is raised as a defense to an age discrimination claim brought pursuant to the ADEA. Furthermore, for the reasons discussed, the relevant provisions are invalid as a matter of law and their enforcement should be enjoined regardless of the validity of the waiver itself. Since the invalid provisions cannot be severed from the remainder of the forms, it would therefore be appropriate to enjoin USS from in the future requiring employees to sign the forms as a prerequisite to obtaining a 70/80 retirement. Further, USS should be enjoined from terminating or reclassifying the 70/80 retirements of those who have violated the invalid provisions. USS should also be enjoined from the continued withholding of pension benefits of individuals who have violated the invalid provisions. Finally, USS should remit to these individuals benefits withheld as a result of the reclassification or termination in amounts to be established in further proceedings.

Accordingly, it is recommended that EEOC and plaintiff intervenor Pennsylvania Human Relations Commission's motion for partial summary judgment be granted and that defendant United States Steel's motion for summary judgment be denied. In addition, it is recommended that injunctive relief be granted.

Respectfully submitted,

Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate

Dated: August 18, 1987

UNITED STATES STEEL AND CARNEGIE PENSION FUND

RECOMMENDATION FOR RETIREMENT INVOLVING EXERCISE OF COMPANY DISCRETION

(Leave Blank)

FILE NO.		RET. NO.	
CASE NO.		TERM. NO.	

1. Name ____________ (FIRST, MIDDLE INITIAL, LAST NAME)
2. Soc. Sec. Number ____________
3. Age ____________ (YRS. & DECIMAL MOS.)

Company Code 74-134

4. Company or Division Eastern Steel
5. Works, Plant or Dept. Clairton Works
6. Service – Continuous ____________
Allowed ____________
Total ____________ (YRS. & DECIMAL MOS.)

7. Occupation ____________

8. ☐ Union ☐ Non-Union ☐ Wage ☐ Salary-Non-Exempt ☒ Salary-Exempt

9. Expected Date Last Worked ____________ (MO.-DAY-YR.)

10. Absent from date last worked to date of retirement due to: ____________

11. Vacation: ☐ Taken ☐ Not Taken

12. Expected Date of Retirement 11-30-82 (MO.-DAY-YR.)

13. Type of Benefits paid during absence indicated in Item 10 ____________

14. Request Initiated By ☒ Company ☐ Employee

15. Transfer Considered ☒ Not Feasible ☐ Not Recommended

16. Work Force Replacement
☐ Required – No Reduction in Work Force
☒ Not Required – Position Eliminated ____________ (POSITION TITLE)
  ☐ At Current Operating Level
  ☒ Permanent Reduction in Work Force – Cost Standards or Actual Expense Reduced.

17. Granting of this pension is recommended on the basis of the following circumstances and reasons:

As a result of a permanent force reduction occasioned by the reorganization of the Clairton Works Management organization, the employees identified on the attached form, PF 116-A, will terminate their active employment effective November 30, 1982.

It has been determined that their positions will be permanently eliminated and transfer considerations are not considered feasible. It is, therefore, recommended that these employees be retired under Mutually Satisfactory Conditions effective November 30, 1982.

18. Recommended By Company Representative for Retirement under Part II-J Pension Rules in accordance with the following provision:

☒ Mutually Satisfactory Conditions
☐ Layoff – Absent less than 2 years – Return Unlikely
☐ Physical Disability – Absent less than 2 years – Return Unlikely
NOTE: If health is a contributing factor, attach Physician's Report PF-101 (and SDBI Claim, if applicable)

____________ (SIGNATURE)
Plant Manager (TITLE)
11-30-82 (DATE)

Recommended By

____________ (SIGNATURE OF DIVISION OR SUBSIDIARY PRESIDENT IF APPROPRIATE)
____________ (TITLE)
____________ (DATE)

____________ (SIGNATURE OF USS AUTHORIZED REPRESENTATIVE)
____________ (TITLE)
____________ (DATE)

INDEX # 38.000.0050 CAT. # 455800

United States Steel Corporation
PENSIONS PURSUANT TO PF-118 RECOMMENDATIONS

PAGE ____ OF ____

NAME AND LOCATION	POSITION AND SALARY STATUS	RETIRED FROM GROUP COVERED UNDER RULE PART	REASON FOR RETIREMENT	RETIREMENT		RECOMMENDED SERVICE (Allowed)
				Date 1982	Age	
CLAIRTON	ALL EXEMPT	MUTUALLY SATISFACTORY CONDITIONS				
Gene L. Avera	Fmn.-Fld.Mtce.	II-J	Reorganization	11-30	53.00	29.92
John W. Bush	TF-Tar & Pitch	II-J	Reorganization	11-30	52.00	31.08
Harry A. Carder Jr.	TF-Mech.Mtce.	II-J	Reorganization	11-30	55.42	34.83
Paul M. Carroll	Fmn.-Masonry	II-J	Reorganization	11-30	56.33	31.08
Eldo DiVirgilio	TF-Naph.& Tar	II-J	Reorganization	11-30	59.08	40.17
Thomas M. Donaldson	Fmn.-Fld.Mtce.	II-J	Reorganization	11-30	49.83	31.33
Roy A. Giovannelli	Fmn.-Masonry	II-J	Reorganization	11-30	52.17	29.92 (14.17)
Allen H. Goodman	Fmn.-Door Repair	II-J	Reorganization	11-30	51.25	30.00
Ronald I. Hallas	TF-Chem.Recovery	II-J	Reorganization	11-30	53.83	35.00 (4.00)
Albert J. Millington	TF-SW & Benz.Blr.	II-J	Reorganization	11-30	51.92	31.25
Abraham Monroe	TF-Batteries	II-J	Reorganization	11-30	55.42	35.58
Malachi Sanders	TF-Batteries	II-J	Reorganization	12-31	49.42	31.08

RECOMMENDED:

____
Vice President-Benefits Administration

DATE SUBMITTED: ______________________________

APPROVED - UNITED STATES STEEL CORPORATION subject to employee signing Application and Release (Form PF-116-B or PF-116-B(R))

______________________________ ____________
Date

______________________________ ____________
Date

[illegible]

United
States
Steel
Corporation

July 21, 1983

Mr. Charles R. Frame
Superintendent - Personnel
Mon Valley Works

Ronald I. Hallas
SS #185-22-5150

We have reviewed the current status of the subject individual. In light of the circumstances covered in the attached July 18, 1983 letter from Mr. R. J. Bradley, you are hereby authorized to process a USS-1 placing Mr. Hallas on layoff, Code 601, effective December 1, 1982, indicating that such form supersedes the original USS-1 processed as a retirement (70/80 Pension Plan).

So as not to complicate the current lawsuit, by copy of this letter I am requesting that Mr. Burke not begin recoupment of the Special Vacation Allowance at this time.

James G. James

James G. James
Director-Compensation

gs
Attachment

cc: R. J. Bradley
D. W. Braithwaite
William Burke
J. T. Carney
T. S. Litras
D. E. Lawrence
C. E. Magistri
J. R. Thornton
P. D. Wanstreet

United States Steel Corporation
Interorganization Correspondence

To: Mr. D. E. Lawrence

Date: July 18, 1983

From: R. J. Bradley

Subject: Ronald I. Hallas
SS# 185-22-5150

Mr. Hallas is one of a group of management employees at Clairton Works whose positions were eliminated in 1982. In November 1982, Mr. Hallas was offered a 70/80 pension under mutually satisfactory conditions, such pension being subject to his signing form PF-116-B which in essence states that in consideration for the applicant's agreement not to enter suit against the United States Steel Corporation, the Company will consider his application as being in the Company's interest. Mr. Hallas signed the form, but noted on the form that he had signed it "under duress". The signing was thus negated and Mr. Hallas was not granted a 70/80 pension. Although eligible, he has not applied for a 30-year retirement.

The BIMS 1A screen is obviously incorrect, and I don't know why it should not be changed. I believe Salary Payroll, Employment or BIMS should be contacted as to what, if any, termination code should be used to reflect his current status. At the present, he does not have any pension status.

RJ Bradley

RJB/rh

United States Steel Corporation

Interorganization Correspondence

To: George A. Manos
Manager-Personnel

Date: June 20, 1983

From: Charles R. Frame
Superintendent-Personnel
Mon Valley Works

Subject: R. I. Hallas Status

It is my understanding that Ronald I. Hallas has not received a 70/80 pension because of a retaliation charge he filed against U. S. Steel. Would you please advise me of his status and if we should process a new USS-1 to place him on layoff.

Charles R Frame

Place on lay-off 11-30-82
per George Manos call 6-24-83
CRFrame
6-27-83.

dem

Attachment

Hold
per CR Frame
6/28/83

1575 Fallen Timber Road
Elizabeth, PA 15037
March 27, 1986

Mr. Bruce Bagin
1000 Liberty Avenue
Pittsburgh, PA 15222

Dear Mr. Bagin:

Per our phone conversation, I am enclosing a copy of page 6 and 7 of U. S. Steel's Severance Pay Program for management employees as amended May 1,1982. Please note paragraph 2.2. I believe this is a willful disregard of the age discrimination laws and would like to include it in my age discrimination charge against U. S. Steel (charge No. 034-821708). I was pensioned from U. S. Steel effective August 1, 1984, prior to that I was on Lay-off from July 24, 1982 until July 31, 1984. I did not receive or was I offered severance pay.

Your prompt reply would be appreciated or you can contact me by phone. My telephone number is 412-751-2650. Thank you.

Sincerely,

Ronald I Hallas

Ronald I. Hallas

1575 Fallen Timber Road
Elizabeth, PA 15037
November 29, 1982

Mr. J. D. Short
Vice President - Administration
United States Steel and Carnegie Pension Fund
600 Grant Street
Pittsburgh, PA 15230

Dear Mr. Short:

This is in response to your letter of November 9, 1982 regarding my retirement under the rule of 70/80.

On November 11, 1982 I was told by Mr. R. Wilson, the Supervisor of Benefits at Clairton Works that he was not authorized to process the forms necessary for me to receive my 70/80 pension until I signed the Application and Release Form (PF116-B). November 30, 1982 being the deadline to do so.

On November 22, 1982 at a Fact Finding Conference with the Pennsylvania Human Relations Commission on an age discrimination charge against United States Steel Corporation (Docket No. E-23798-D), I was told by Mr. Orbin, Manager of United States Steel's E.E.O.C. Department "unless Form (PF116-B) was signed by November 30, 1982, the window was closed and the offer would not be made again".

In view of the above and due to financial necessity I have signed the Application and Release Form, but have done so under duress.

At the above mentioned Fact Finding-Conference I informed Mr. Orbin, Mr. Wilson, and the Pennsylvania Human Relations Commission Representatives, I have written the United States Department of Labor regarding this form, enclosing a copy of your letter dated November 9, 1982 and a copy of form PF116-B. The letter stated that form PF-116-B was a new form (October, 1982) and a result of numerous age discrimination charges against United States Steel Corporation and not used prior to October, 1982.

I strongly protest and disagree with all the provisions of this form. I feel this form reduces me to a second class citizen to go as far as to deny me the right to counsel or assist as the form states a member of my family or a friend should they ever have cause to file a claim against United States Steel Corporation also rights guaranteed me under the Constitution of the United States.

Sincerely,

Ronald I. Hallas

Ronald I. Hallas

Hallas
DEPOSITION
EXHIBIT
5
VLW 7-21-86

The **CHAIRMAN**. Mr. Hallas, you were discharged or terminated in the fall of 1982?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. And this was after being with this company 35 years?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. And how long were you a foreman?

Mr. **HALLAS**. Seventeen years.

The **CHAIRMAN**. Seventeen years as a foreman?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. Now, at the final termination is it fair to say that you were coerced to sign a waiver?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. Had you approached the Commission prior to that time?

Mr. **HALLAS**. Yes. I had filed a charge against them before that.

The **CHAIRMAN**. You filed a complaint on the basis of age discrimination?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. And then what happened after you were coerced into signing the waiver?

Mr. **HALLAS**. I took it down to the EEOC and showed it to them and I filed a retaliation charge against that form, saying that because essentially I was told if I didn't sign the form I would be put on a 2-year layoff.

The **CHAIRMAN**. You'd be put on a 2-year layoff?

Mr. **HALLAS**. I would be put on a 2-year layoff and that my hospitalization and all my benefits would cease effective December the 1st, which was a month later.

The **CHAIRMAN**. That's coercion then?

Mr. **HALLAS**. Yes, it is, Senator.

The **CHAIRMAN**. It's pure and simple coercion.

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. In the first instance you filed a complaint with the Commission on the basis of age discrimination and then secondly you amended that complaint on the basis of having to sign the waiver under coercion?

Mr. **HALLAS**. Yes.

The **CHAIRMAN**. Now you're not alone in this particular company?

Mr. **HALLAS**. Oh, no. There were hundreds.

The **CHAIRMAN**. There were hundreds of them?

Mr. **HALLAS**. Hundreds, yes.

The **CHAIRMAN**. Did you receive the type of cooperation from the Commission that led you to believe that you thought your rights were going to be protected?

Mr. **HALLAS**. No. And because you know, you think you see ads on television that if you think you've been discriminated against for whatever reason to call a number, or call the EEOC. Well, I did call the EEOC, but the EEOC wasn't there for me.

The **CHAIRMAN**. In other words, you didn't get a response that was reassuring at all?

Mr. **HALLAS**. No. It was turned over to the Pennsylvania Human Relations Commission.

The **Chairman**. They said—the Commission said to you, go to the Pennsylvania Human Relations Commission?

Mr. **Hallas**. Well, they took the charge, but they turned it over to the Pennsylvania Human Relations Commission. I didn't want them to because they're not very effective really. And there was no choice. That's where it was sent to.

The **Chairman**. And then did you hire a private attorney?

Mr. **Hallas**. Yes.

The **Chairman**. To protect your rights both on the question of age and the question of coercion to sign the waiver?

Mr. **Hallas**. Right, right.

The **Chairman**. Do you have a suit pending?

Mr. **Hallas**. Yes.

The **Chairman**. In Federal court?

Mr. **Hallas**. Yes. Of course, I also amended it again to include the denial of severance pay which the courts have already said that that's a willful violation of the ADEA law. But as far as I know the EEOC has not gone to my former employer and told them that they're violating the law. They haven't done anything to force them to pay their older workers severance pay.

The **Chairman**. You had three complaints then before the Commission?

Mr. **Hallas**. Yes.

The **Chairman**. One on age discrimination, secondly on coercion in signing the waiver, and third, you're entitled to some sort of severance pay?

Mr. **Hallas**. Denial of severance pay.

The **Chairman**. And the Commission's response to you had been go to the Pennsylvania Agency and let them take care of it?

Mr. **Hallas**. Yes. Except on the waiver, they finally did go into court on the waiver that we were required to sign. And as I said an injunction was issued against the use of some of the main provisions of that form.

The **Chairman**. And then the company changed the form and what's been the Commission's response to that?

Mr. **Hallas**. Well, I don't think there was any response to it, but the Magistrate's recommendation was that they not be permitted to require people to sign either the form they started to use, which they called PF-116B, or PF-116C. But they continued to have people sign that form up until mid-August of 1987 but they didn't bother to tell people that they couldn't enforce the provisions of that form. They just said you have to sign this form or the same thing that they told me. Sign the form and take the pension or you take the 2-year layoff. They didn't bother to tell them that the key provisions in that form, which was that they would take the pension off of you, that they couldn't enforce that. That they would be violating an order from the Federal judge.

The **Chairman**. Mr. Hallas, would it be fair to say that you found the reaction of the Commission to be one of simply recommending that you go to a State agency in Pennsylvania?

Mr. **Hallas**. Well, you know, I really tried very hard to get the EEOC to take the case, because it was a large corporation. They had a large legal staff and to go up against them is tough for a small individual like myself. But as hard as I tried I couldn't get them to do it. And I'm sure if they had they would have found that there was all the people, most of the people that left the plant that I worked in was because they were eligible for a pension. And of course to be eligible for a pension you have to have some age.

The CHAIRMAN. Thank you very much, Mr. Hallas.

Senator Heinz.

Senator HEINZ. Mr. Chairman, thank you.

I think Mr. Hallas, the Chairman's done a very good job of laying out some of the things that have happened to you and has traced with great care your various kinds of problems and roadblocks you've run into.

I'm particularly interested in a number of things. But first and foremost, where you are right now. For a considerable period of time, you mentioned 20 months, you were cut off from benefits that were due you.

As I understand your testimony you've not yet received those benefits, is that correct?

Mr. HALLAS. That's correct.

Senator HEINZ. May I ask how much that amounts to?

Mr. HALLAS. About $27,000.

Senator HEINZ. That's $27,000?

Mr. HALLAS. Yes.

Senator HEINZ. How did you manage to live, to get along during that period between 1982 and 1984 when you were denied those benefits?

Mr. HALLAS. Most of—well, I did get some unemployment compensation, but my savings that I had accumulated over a lifetime was substantially depleted.

Senator HEINZ. How much did you have to draw down on those savings?

Mr. HALLAS. Out of my savings, I'd say $18,000.

Senator HEINZ. Eighteen thousand dollars of your savings were depleted?

Mr. HALLAS. Yes.

Senator HEINZ. At this point do you see yourself getting your $27,000 that you were entitled to?

Mr. HALLAS. Well, the only way I can answer that is tell you I'm not going to spend it until I get it.

Senator HEINZ. Spoken like a true, tough Pittsburgher.

Mr. HALLAS. Yes.

Senator HEINZ. You have hired a lawyer. Have you had to hire him on a contingency fee basis that if you get your $27,000 he gets a slice of it?

Mr. HALLAS. Yes.

Senator HEINZ. How big a slice is he going to get?

Mr. HALLAS. I really haven't committed myself to that because the attorney that I have right now is a very good attorney and it is not their policy to take cases on a contingency basis. They have a flat hourly rate which I could not afford to pay. And I told him that. And I said there's no way I can afford to pay you that fee. And he did agree to take the case on a contingency basis but of course I have to pay all the other costs, you know. The filing fees and everything else that goes with the suit in court.

Senator HEINZ. So what you're saying is it's your intention if you can to pay him based on kind of what you think is fair and reasonable at a future point in time. But in the meantime he's doing without any formal obligation from you. He's giving you at least partially free legal services?

Mr. HALLAS. Yes.

Senator HEINZ. I must say I'm deeply troubled by what has happened to you and I gather a number of other people in your circumstance.

I'd like to spend a minute on the question of the waiver, which is form PF-116B?

Mr. HALLAS. Yes.

Senator HEINZ. How is form PF-116C different from PF-116B?

Mr. HALLAS. PF-116B has in it that you will not counsel or assist in the prosecution of any claims, or any claims that are filed. And also it had in there that you gave them the power of attorney to withdraw any suit or any claim.

Senator HEINZ. That was in the first one?

Mr. HALLAS. In the first one. How PF-116C is almost identically the same except the counsel and assist provision is not in there and the power of attorney is not in there. And I would like to also add that since the Magistrate's ruling against them having to sign PF-116B or C, I understand now they have PF-116D. So, you know, they just keep trying and trying.

Senator HEINZ. I know that you were kind enough to put in the mail to us examples of those waivers. Due to the super efficiency of the U.S. Postal Service, we have not yet received—you are here, but what you sent us I gather either last week or early this week is not.

Mr. HALLAS. Well, I did bring another copy of this with me. So they are down in your office.

Senator HEINZ. We'd like to receive a copy of that for the record of the committee.[1]

By the way that single bell, that light up there on the lefthand side means we have a vote taking place and I imagine the chairman will want to temporarily recess the committee for that.

I have just one other question. The EEOC did pursue, as I understand it, your charge of coercion, is that correct?

Mr. HALLAS. Yes. They did go after them because of the form but not my age discrimination complaint.

Senator HEINZ. They did not pursue age discrimination. And with respect to your pension, you have filed with them a claim having to do with your pay?

Mr. HALLAS. Well, I believe that I was mentioned in the suit that EEOC filed on the waiver, but that—the Magistrate made the recommendations, but as far as I know the judge has not signed the recommendations or indeed if we will even agree with the Magistrate's recommendations. I don't know.

Senator HEINZ. You mentioned that at one point there was a finding, I think it was by EEOC, that you had been wrongfully denied your benefits?

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[1] See. p. 29.

Mr. **Hallas**. Yes.

Senator **Heinz**. That was a finding made by EEOC?

Mr. **Hallas**. Yes. That was all brought into the suit on the waiver that they required us to sign.

Senator **Heinz**. When was that finding by EEOC made?

Mr. **Hallas**. Well, when they filed the suit in 1984, in early of 1984.

Senator **Heinz**. And is it your understanding in discussing this with your attorney that the only way the finding of EEOC can be enforced against your former employer and your money recovered is through the court suit?

Mr. **Hallas**. Yeah.

Senator **Heinz**. Otherwise they simply won't pay?

Mr. **Hallas**. No, they won't pay unless the judge rules against them.

Senator **Heinz**. And does your attorney feel that EEOC cannot compel them to pay?

Mr. **Hallas**. No. Right now he's not sure how it will come out in court.

Senator **Heinz**. All right.

Now, Mr. Hallas, I want to say to you very much what I said to Professor Jungels, that we really appreciate your coming down here. What has happened to you, I think, is unfair, unfortunate, and unjustified. You have been put at great financial risk. Your dignity has been undermined and your ability to provide for your family has been seriously jeopardized. None of that is right. And your being here is going to, I hope, help us right it. I thank you very much.

Mr. **Hallas**. Thank you.

The **Chairman**. Senator Shelby.

Senator **Shelby**. And you're not an attorney yourself?

Mr. **Hallas**. No.

Senator **Shelby**. Had you been in ordinary business transactions or had you been mainly an employee of this company most of your life?

Mr. **Hallas**. Well, I started there when I was 18 years old.

Senator **Shelby**. Eighteen years old?

Mr. **Hallas**. Yes.

Senator **Shelby**. And you worked there how many years?

Mr. **Hallas**. Thirty-five.

Senator **Shelby**. Thirty-five years and they basically told you—I don't want to beat this horse to death—but they said, "if you want these benefits you sign this waiver?"

Mr. **Hallas**. They basically told me we don't want you any more. You take your pension or you take a 2-year layoff and then you take your pension. That's basically what they told me. You know, if you don't dress it up and you put it down and tell it the way it is, that's basically what I was told.

Senator **Shelby**. And that was in 1982?

Mr. **Hallas**. Yes.

Senator **Shelby**. It's 1987 and your case is still pending, is it not?

Mr. **Hallas**. Yes.

Senator **Shelby**. But as Senator Heinz has detailed in his questions and his statement, you had to go outside the system away from the EEOC to pursue a private remedy in court, did you not?

Mr. **Hallas**. Yes.

Senator **Shelby**. And that's what you're doing now with your attorney?

Mr. **Hallas**. Yes.

Senator **Shelby**. Mr. Chairman, I would like to make an observation—something that has been addressed over and over this morning. It looks to me like it is some sort of a design by EEOC, this lack of attention and lack of interest in these cases. And I, like the Chairman, Senator Melcher, and Senator Heinz, appreciate you coming down here and testifying for this committee, Mr. Hallas.

Mr. **Hallas**. Thank you.

The **Chairman**. Senator Chiles.

STATEMENT OF SENATOR LAWTON CHILES

Senator **Chiles**. I don't think I can add anything, Mr. Chairman. I'm delighted that you're holding a hearing on this subject and I think it's tremendously important. We all know that cases like Mr. Hallas' have been happening for a long time. And I agree with what Senator Shelby said. This is what EEOC is supposed to be about. And I'm delighted that you're in oversight on this.

The **Chairman**. Thank you Senator, and thank you very much, Mr. Hallas, for your testimony. You're giving us the fuel that we need in order to light fire under the Commission and see whether we can bring the Commission to the point where they must enforce the law as they're required.

Thank you very much.

The buzzers you just heard and the lights that are up on the clock indicate that a vote on the Senate Floor is in progress and it will be necessary for all of us to vote ourselves. And for that reason the committee will stand in recess for 10 minutes.

[Recess.]

The **Chairman**. The committee will come to order.

The next witness will be Dr. Kermit Phelps, Chairman of the Board of American Association of Retired Persons.

Dr. Phelps.

STATEMENT OF DR. KERMIT PHELPS, CHAIRMAN OF THE BOARD OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

Dr. **Phelps**. Thank you, Mr. Chairman, members of the committee.

I am Dr. Kermit Phelps, Chairman of the Board of the American Association of Retired Persons. AARP counts among its more than 26 million members over the age of 50 more than seven million members who work full or part time. These members, like all workers over the age of 40 are protected from age-based employment discrimination by the Age Discrimination Employment Act. AARP therefore takes great interest in the interpretation, implementation and enforcement of that law by the Equal Employment Opportunity Commission. And I want to thank you for the opportunity to present AARP's views on some of the issues that we consider to be the kind to be very much concerned about.

Like many civil rights laws the ADEA's effectiveness depends upon vigorous enforcement by the Federal agency charged with protecting the rights of victims and potential victims. Unfortunately, a look at the EEOC's actions with regard to the ADEA over the past few years highlights its refusal to fulfill its obligation to protect older workers from employment discrimination. The EEOC has not only failed to enforce the statute and its own regulations, but seems to have taken steps to diminish the rights of older workers. I will briefly address three examples of this.

Permitting unsupervised waivers of ADEA rights. Permitting early retirement and exit incentive programs to offer lower or no cash incentives to older workers; and the Commission's conduct of the Pension Benefit Accrual Rulemaking. My colleagues from the National Senior Citizens Law Center and the Older Women's League will address other important issues, particularly the EEOC's ADEA litigation strategy and its lack of attention to the multiple discrimination faced by older women.

The unsupervised waivers of ADEA rights. On July 30, 1987 the EEOC voted to allow employees to waive their rights to sue under the ADEA without EEOC supervision, ignoring specific language in the law that says unsupervised ADEA waivers are not legal. It will now be much easier for employers to obtain such waivers in exchange for benefits unlawfully withheld or otherwise illegally offered. The EEOC tried to justify the rule by referring to Title VII, which prohibits sex and race discrimination in employment and permits unsupervised waivers, ignoring the fact that Title VII and the ADEA are actually quite different. The EEOC also relied upon a case that permitted a valid unsupervised waiver, but the plaintiff in that case was an experienced labor lawyer, certainly not a typical ADEA plaintiff. Furthermore, the EEOC ignored its own previous position in Federal cases, where it has flatly refused to permit unsupervised ADEA waivers to be valid. See *Valenti* v. *International Mills.*

AARP opposed this rule when it was proposed in 1985 and has asked for reconsideration of the final rule. AARP's papers in support of its position, which are attached, discuss these issues in more detail and show that the Commission does not have the authority to erase the statutory requirement that valid waivers be supervised by EEOC. Older workers, almost half of whom are unaware of even the existence of the ADEA, are entitled to this protection.

The primary result of this rule will be to encourage employers to offer early retirement incentives to older workers in age discriminatory fashions, the most common circumstance in which a waiver is requested by an employer. AARP does not oppose early retirement incentives, however, it is astonishing that the Federal agency charged with promoting the employment of older persons would instead make it easier for employers to target older workers when downsizing a labor force. The Commission is indeed encouraging speedy negotiations, all to the advantage of the employers and at the expense of workers' rights.

Early retirement incentive programs. In recent years, employers who have faced the need to reduce their work force have turned increasingly to the use of exit incentives as an alternative to mandatory layoffs and their accompanying hardships. Often, these exit incentives take the form of early retirement incentives. Such incentives have been offered to hundreds of thousands of employees in the past decade.

Early retirement and exit incentives take many forms. Although AARP does not discourage their use, it is clear that such programs must be carefully structured so as to comply with the ADEA. It is imperative that the EEOC lay the groundwork for such compliance. But, unfortunately, recent actions by the Commission indicate that once again, it is favoring employers at the expense of workers.

There are a number of ways to determine whether an exit incentive is legal under the ADEA. Is it truly voluntary? Are different benefits offered to different employees based on their age? Are these differences justified by different costs to the employer? Or, are they merely a subterfuge to evade the ADEA?

The ADEA permits employers to differentiate in benefits offered to employees if it is shown that the cost of providing an equal benefit for an older worker is greater than that for a younger worker. This is a rigid standard. But, employers have attempted to use this part of the law to justify offering younger workers greater sums of money to exit the labor force than older workers. The employers argue that they save more in future payroll costs when a younger employee leaves because an older worker is expected to work fewer years in the future. To our great shock, the EEOC, in a recent brief in Federal Court, agreed with this and approved the practice of lowering or no cash incentives to older workers in such programs. Not only is this contrary to the law, but it is contrary to the EEOC's own regulations.

In its brief in the *Cipriano* case, the EEOC essentially argues that so long as an exit incentive is voluntary it is legal. However, voluntariness is often an irrelevant or minor consideration, particularly when the cash incentive is offered only to younger workers, as was in the case of *Cipriano*. The issue of voluntariness has no bearing on an employer's attempt to justify different cash benefits based on age. But, the EEOC also suggests that general economic savings to the employer, such as the savings in future salaries, are permissable grounds for overt discrimination. And this is astonishing given the fact that saving money has never been permitted to justify discrimination. Indeed, the purpose of the nondiscrimination law is to change the economics so that discrimination becomes more costly than nondiscrimination.

The ADEA, even as the EEOC has interpreted it, has never permitted employers to do anything other than justify differences in benefits based on different and quantifiable costs to the employer. When the benefit itself is cash, there is no difference in cost to the employer. The assumption that there will be payroll savings in the future is not a cost to the employer but is speculative, unsupported and, given the mobile nature of today's labor force, untrue.

Commissioners have indicated that they believe that it is more humane to use exit incentives to downsize a labor force than layoffs or terminations, and therefore employers should be encouraged to use them. This determination is outside the Commission's jurisdiction. More important, it does not justify targeting older workers from these incentives rather than offering them to all employees. It does not justify offering lower or no cash benefits to older employees. And it does not justify the EEOC favoring the financial interests of the business community at the expense of older workers.

Post-normal retirement age pension benefit accrual. In June 1984, the Commissioners of the EEOC decided that the ADEA required employers to continue to post credits to the pensions of workers who worked past normal retirement age, which is usually 65. They reaffirmed this position in March 1985. However, in November 1986, the Commission ended the rulemaking that would have implemented its position and refused to rescind an interpretation that allowed employers to stop pension credit accruals for older workers. This action came after years of dilatory tactics, misleading statements to Congress, and inappropriate and undocumented influence by other agencies. The cost to employees, $450 million annually in lost pension benefits.

The EEOC attempted to justify its action by relying upon the law passed by the 99th Congress requiring pension benefit accrual after January 1988. Congress, however, explicitly said that the new law was to have no effect on existing interpetations of the ADEA. Indeed the Commission has never changed its position that the ADEA currently required post-normal retirement age pension benefit accrual.

In June 1986, AARP, the National Senior Citizens Law Center and the Older Women's League sued the EEOC to force it to finally issue the new regulations after delaying them for years. We succeeded in forcing the EEOC to rescind the interpretative bulletin that continued to permit employers to stop posting credits to the pensions of workers older than age 65. The termination of the rulemaking in November 1986, however, effectively mooted the other issues raised in the lawsuit. The Commission is content now to allow employers to engage in conduct it has determined to be illegal. It has left employers, employees, and the courts in the dark as to how the law is to be interpreted.

The Commission's conduct in the pension accrual rulemaking and litigation was dilatory and obstructionist. Rather than consider the costs of discrimination to older workers, it showed employers every consideration and worked to delay publication of a rule it has repeatedly held to be required by law.

I want to thank you for the opportunity of presenting this to you.

The **Chairman**. Dr. Phelps, the American Association of Retired Persons has with diligence and persistence pursued the effect of the Commission's actions over the past several years.

Have I interpreted your statement correctly that while the Commission did rescind the interpretative bulletin that permitted employers to stop posting credits to the pensions of workers older than 65, that the Commission did not pursue the rule that they had been developing?

Dr. **Phelps**. That's correct. They apparently put that on the shelf. From the point of view of the AARP in terms of the way they saw the Commission's actions, it was more like rather than being the advocate or the protector of the working individual, they were more like the fox guarding the hen house.

The **Chairman**. So while it's clear that as of January 1, 1988 Congress is directing that there be accrual of these credits, these pension credits, the Commission is not enforcing the law during the interim?

Dr. **Phelps**. Correct. Even though that by their own admission they have indicated that this is one of the things that is their responsibility.

The **Chairman**. And it's AARP's estimate that this involves $450 million?

Dr. **Phelps**. Lost in accrued pensions over that period of time, yes.

The **Chairman**. That's a lot of money.

Dr. **Phelps**. I'm sure it will not be recouped either.

The **Chairman**. It's very disturbing that the position of the Commission, as evidenced by the rulemaking process that they were pursuing has done a complete flip-flop and said there's no need for that and therefore $450 million is in limbo unless Congress should act to enforce that. Perhaps that's our mandate.

Dr. **Phelps**. Yes.

The **Chairman**. For Congress to enforce the accrual payment for those workers on their pensions over 65.

Senator Wilson.

STATEMENT BY SENATOR PETE WILSON

Senator **Wilson**. No questions of this distinguished witness, Mr. Chairman. I'm sorry that my duties at the Commerce Committee on the confirmation hearings have prevented my getting here earlier.

The **Chairman**. We're glad to have you here now, Senator, and appreciate your presence.

Thank you very much, Dr. Phelps.

Dr. **Phelps**. Thank you.

The **Chairman**. Mr. Burton Fretz, Esquire, Executive Director of the National Senior Citizens Law Center.

STATEMENT OF BURTON FRETZ, ESQ., EXECUTIVE DIRECTOR OF THE NATIONAL SENIOR CITIZENS LAW CENTER

Mr. **Fretz**. Thank you, Mr. Chairman.

My statement has been submitted and I ask that it be included in the record. I'll make only brief remarks in summary, and I do want to commend the Chair and the committee for convening these hearings today. I think they deal with a very difficult and important topic and they are most timely.

The **Chairman**. Your entire statement will be made part of the record.

Mr. **Fretz**. Thank you, Mr. Chairman.

The National Senior Citizens Law Center provides support and technical assistance and co-counseling to legal services attorneys and members of the private bar across the country. That includes assistance in age discrimination and mandatory retirement cases. And as a result of that experience we have a number of observations responsive to the committee's request for information about how well, or, as it may be, how defectively the Commission is approaching its statutory duty of enforcing the ADEA.

We're particularly disturbed by what appears clearly as a shift in approach by the Commission over the last couple of years, at least, away from litigating under the ADEA on issues that have broad impact in protecting older workers protected under the Act, and toward filing and resolution of cases that have much more limited or even individual impact. The Commission has indicated that within its litigation case load, even currently, there is a significant number of cases it has characterized as class actions or class cases. We take that to mean cases involving more than simply the named parties. Nonetheless our understanding is that a large number of those cases, which are called class actions by the Commission, involve actions that have been filed for some time challenging age limitations with respect to hiring or mandatory retirement of police and firefighters under State and local laws. And while that's important they represent just a very narrow issue and narrow segment of the total older worker population to be protected.

What's more, the amendments adopted by Congress last year create a 7-year exemption grandfathering those State and local hiring and mandatory retirement provisions which suggest that a large number of those cases may indeed be mooted out or at least resolved on the basis of that exemption. So if we take out of the Commission's reports those cases dealing with police and firefighter age limitations, we suspect that we would see a pronounced tendency away from the kind of broad issues and attacks on systemic age discrimination toward more individualized resolution of complaints.

The Commission has adopted some informal procedures which seem to augment this whole tendency. That too is disturbing. For example, prior to this spring the Commission generally recognized a 300-day period for the investigation of age discrimination complaints at the district office level. We understand that 300-day period has been shortened to a period of 150 days under the performance agreements that govern the review of performance by district office directors. Now, 150 days may be proper for resolution of purely individual complaints. For complex cases of age discrimination that might be company wide or industry wide, 150 days may be way too short. This creates pressures on the district office staff toward quick resolution of complaints and against the recommendation of litigation, simply because they don't have the time to work them up adequately.

In addition, a former rule of thumb was that each district office was expected to produce at least 24 presentation memoranda, or litigation recommendations, each year. That's two a month. The idea, as we understand it, was to have at least a minimum expection for each district office. And of course it could well exceed that minimum given the large volume of age charges that are filed with the Commission on an annual basis. That minimum has been eliminated. It hasn't been replaced with any other kind of formal expection for the district offices. When you take the shortening of the period for investigation and the dropping of any expectation with respect to recommendations for litigation, you can see that the pressures internally are generated toward quick resolution of complaints and against the kind of systematic development of litigation which would attack the kind of systemic age discrimination that caused Congress to enact and to amend the ADEA in the first place.

The latest published annual reports of the EEOC case load from Fiscal Year 1984 indicate that for the Fiscal Year 1984 a very high proportion of Age Act complaints filed with the Commission were resolved with what they call the no cause or no violation stamp. Just under 60 percent, I believe 57 percent if my math is correct, of all the cases filed under the Age Act had that summary and negative resolution. That's about twice as high as the rate of summary and negative resolution performed by state and local agencies administering either the Age Act or similar age complaints. It's also about twice as high a rejection rate as the Commission experienced the same year when it processed complaints under Title VII. This Committee might ask why the rejection rate on complaints was running so high in 1984 on ADEA cases and what the statistics would show for 1985, 1986 and the current year as well.

Policy positions taken by the Commission of late are extremely troubling. They reject, outright in many instances, the positions reflective of the interests of older workers on the issue and adopt the interests of employers on the issue. This has been a disturbingly consistent position on the part of the Commission for the last few weeks.

I call the committee's attention to the friend of the court brief which the Commission filed recently in the Court of Appeals in the Second Circuit in the case of *Paolillo* v. *Dresser Industries.* The Commission came in following an opinion of the Second Circuit which remanded the case for further hearings based upon charges of age discrimination by three former employees alleged that they had been given anywhere from 1 to 6 days to decide whether to accept or reject a termination offer by the employer, which was targeted at workers only over the age of 60. The three plaintiffs in the case, incidentally, were representing themselves. They were not represented by counsel.

The EEOC came into the case at that juncture as a friend of the court seeking a rehearing of the case by the Second Circuit. In so doing it adopted a position virtually indistinguishable from that taken by the employer in the case. *Dresser Industries,* and by the New York State Chamber of Commerce, which was also in the case as a friend of the court. The key issue on the appeal had to do with the elements of a prima facie case which these unrepresented former employees had to demonstrate, and whether the employer or the employees were to assume the burden of proof on the issue of whether they were coerced into accepting the agreement in question.

The rulemaking activity of the Commission in recent months is similarly disturbing. Mr. Phelps for the AARP has already indicated the kinds of approaches which invite criticism with respect to the pension accrual rules and the recent rules adopted by the Commission permitting unsupervised waivers of rights and settlement of claims under the Act.

I would like to add that similar problems attend the Commission's somewhat summary treatment lately of the apprenticeship exclusion. Since 1980 the Commission has been considering, off again and on again, a rule which would prohibit employers from practicing age discrimination through apprenticeship programs. Historically those programs have been opened by employers to very young workers, age 28, 30, 32, but not to workers beyond that. Predictably apprenticeship programs have a very harsh effect on middle-aged and older workers who then lack the opportuntiy to gain on-the-job training, particularly in highly technical areas. In an industry affected by plant closings and layoffs, it's the older workers who are targeted for layoffs and non-rehire because they either haven't had training skills or don't qualify for apprenticeship training skills. When the Commission had public comment on its proposed rule to eliminate apprenticeship exclusions back in 1980, a large number of women's groups and civil rights groups, as well as aging organizations, urged the adoption of that rule and dropping of the apprenticeship exclusion.

The Commission proposed to drop that exclusion in 1980. The result of that action was somewhat desultory, but again in 1984 general counsel to the Commission, in no uncertain terms, indicated that the exclusion for apprenticeship programs had no basis in the Act, no basis in its legislative history, and was contrary to the purposes of the Act. Counsel recommended that the exclusion be dropped by formal rule. The Commission then proposed a formal rule to do just that in 1984. Since that time the proposal went to the Office of Management and Budget, OMB sent the rule back to the Commission asking that employer interests be considered, and on July 30 the Commission simply terminated its rulemaking. The effect of this was to perpetuate the apprenticeship exclusion.

The general counsel back in 1984 offered the Commission an exhaustive analysis of the law and the Commission adopted it. It's very clear that the apprenticeship exclusion simply doesn't have ground either in the Act or its legislative history. All of that was disregarded by the Commission last July. Even more distressing is that this Commission does have the power under Section 9 of the Act to entertain applications by individual employers for an apprenticeship exclusion in that particular company, or for that particular apprenticeship program. The Commission simply disregarded its own power to consider individual applications for exemptions, and instead created a blanket exclusion for apprenticeship programs by any employer covering any employees. This applies as long at the program is bona fide, which is not hard thing to show.

And we believe that such a blanket insulation by the Commission, rather than a careful case-by-case approach, is simply not an effective discharge of duties under the Act.

So in summary, Mr. Chairman, we believe that the office procedures, the philosophy of litigation, and the specific examples of litigating posture and rulemaking by the Commission all reflect a serious shortfall at the highest levels of the Commission in efforts to carry out responsibilities under the ADEA.

Thank you for the opportunity to appear.

[The prepared statement of Mr. Fretz follows:]

STATEMENT OF BURTON D. FRETZ

EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER

before the

SPECIAL COMMITTEE ON AGING, UNITED STATES SENATE

September 10, 1987

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to respond to the Committee's request for testimony on the administration and enforcement of the Age Discrimination in Employment Act by the Equal Employment Opportunity Commission (EEOC). Age discrimination is a matter of utmost concern to the low income older Americans which the Law Center serves, and this inquiry by the Committee is very timely.

The National Senior Citizens Law Center is a national support center providing legal advocacy and specialized support on legal problems of the elderly poor. The center provides assistance to legal services attorneys, private attorneys rendering pro bono services to low-income seniors, and representatives of older clients under the Older Americans Act on a national basis. Our staff responds to over 3,000 requests annually from attorneys across the country for advice, technical assistance and co-counsel, including requests in age discrimination and mandatory retirement cases. With this experience we are happy to comment before the Committee on the EEOC enforcement of the ADEA.

In the past two years the EEOC has shifted its litigation strategy, its internal procedures, and its policy making under the ADEA in a way which threatens the interests of the very people which that Act is designed to protect. This shift appears in numerous ways.

(1) EEOC litigation has moved from broad reforms to individual cases. The EEOC has made much recently of the fact that its litigation case loads have not decreased since 1981. In the ADEA setting, however, the number of ADEA charges filed with the Commission has grown enormously from 9,479 charges in 1981 to more than 26,000 charges in the current year. EEOC litigation has not nearly matched this three-fold increase in cases coming before it.

Even more disturbing is the EEOC's shift away from cases involving systemic age discrimination to cases of individual complaints. In February of 1985 the EEOC announced that it was moving away from enforcement in areas of broad complaints against large companies and entire industries in favor of cases involving specific persons. The implication is clear: The EEOC has chosen to focus on individual complaints, thereby attacking age discrimination at random, rather than using its expertise and resources to identify and target patterns and practice of age discrimination.

Focusing on simple cases may help the EEOC to maintain its level of litigated cases, but the impact of that litigation is narrowed. The House Education and Labor Committee reported last year, for example, that in the first half of 1985 only 2,964 persons were compensated through all EEOC cases, compared with 15,328 in 1980. It is the number of persons helped, not the number of cases filed, which is the more important criterion in gauging EEOC effectiveness. EEOC staff enforcement of the ADEA continued to be somewhat effective until the departure from the EEOC early this year of Acting General Counsel Butler. Many EEOC litigated cases were in the pipeline at EEOC prior to Mr. Butler's departure, and are reflected in EEOC case load statistics for the past reporting year. Accordingly, scrutiny should be given to cases reported by month, and by calendar quarter, for current periods, in monitoring its level of litigation under the Act.

(2) The EEOC has shifted toward pro-employer positions in litigation. The primary purpose of the ADEA is to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in the employment setting. Unfortunately, in recent months the Commission appears more interested in applying its resources to support the position of employers in age discrimination actions rather than the older workers whom the statute is designed to protect.

A recent example is the case of Paolillo, et al. v. Dresser Industries, Inc. involving a claim by several older workers that the employer had unfairly coerced employees above age 60 into involuntary acceptance of early retirement. A panel of the Court of Appeals for the Second Circuit remanded this case to the District Court for further findings on whether the retirements were voluntary and whether the retirement plan was a subterfuge to evade the purposes of the Act.

The EEOC filed a friend of the court brief seeking a reversal of that decision. It is remarkable in several respects. First, the EEOC argued for a higher standard by which the plaintiffs would have to establish the element of coercion in attacking the retirement plan. Second, it argued that the older workers, rather than the employer, should bear the burden of proof on the element of voluntariness. Third, the EEOC -- which was not a party to the case -- took a position virtually indistinguishable from that of Dresser Industries and another friend of the court, the New York Chamber of Commerce. In doing this the EEOC opposed the plaintiffs, consisting of several older workers who had been representing themselves without an attorney up to that point. Moreover, the EEOC sought rulings on questions of law having broad impact in other cases affecting the ability of similarly situated plaintiffs to establish proof of age discrimination.

(3) Changes in office procedures limit the effectiveness of ADEA enforcement. The EEOC has made two significant changes in the Performance Agreement for district directors this past spring which will significantly restrict the ability of EEOC staff to enforce the Act aggressively. One change replaced the former 300-day time limit on investigation of complaints with a new 150-day limit. The ostensible reason for the change was to assure prompt processing of complaints. While this goal is laudable with respect to individual cases, it is unrealistic to expect staff to investigate and prepare for litigation a complex case involving systemic age discrimination in a mere 150 days. The effect of this rule is to promote resolution of cases without litigation, or litigation over the simplest and most individual complaints.

The second change in procedure eliminated a former rule of thumb that each district court produce 24 litigation recommendations (called "presentation memos") annually, or two per month. The number 24 carries no magic; nonetheless it represents a minimum number of litigation recommendations which could be easily satisfied out of the 26,000 age discrimination charges which the EEOC receives annually. However, even this bare minimum has been removed. This change, taken in tandem with the shortening of the time limit on investigations discussed above, creates pressure on district office staff to treat cases as simply as possible and to resolve all cases as quickly as possible. While this may look good on flow charts, it will have a disastrous effect on litigation involving patterns and practice of age discrimination.

(4) EEOC rule-making on waiver of worker rights does not advance the Act's enforcement. On July 30, 1987, the EEOC adopted a final legislative rule permitting the waiver of rights and the settlement of claims under the ADEA without EEOC supervision if the waivers and settlements are knowing and voluntary and not prospective in nature. The EEOC first proposed this rule after an employer had lost on this issue before a panel of the Sixth Circuit Court of Appeals. That court had ruled that ADEA remedies are patterned after the Fair Labor Standards Act, and FLSA law for over 40 years has prohibited unsupervised waivers and settlements as against public policy. Although the Sixth Circuit panel was eventually overturned by the full Court of Appeals, the EEOC nonetheless persevered to push the employer's position into a final legislative rule.

The effect of the final rule is to place a threshold barrier in front of an older worker seeking to protect rights under the ADEA after signing a waiver. Because of the rule, such a worker cannot secure review of the merits of an ADEA claim without first proving that any waiver or release of rights was coerced.

The problem is compounded by the enormous difference in bargaining power between employer and older worker in most situations. The employer has a battery of lawyers, a sophisticated personnel office, and tremendous economic leverage over older workers who, in turn, face economic insecurity and lack sophistication in such matters. Many older workers have no knowledge of their rights under the ADEA. Nonetheless, the EEOC now places the burden entirely on all older workers to establish that any settlement or release of claims was other than voluntary.

The EEOC's ostensible reason for adopting this rule is to promote the expeditious settlement of claims. This purpose is fine enough on its face, but appears pretextual on inspection. Throughout its rule making the EEOC refused to inquire why its staff cannot review proposed settlements and releases in a short period of time; why such review cannot be consistent with expeditious settlement; and why the protection of older workers that such review affords does not outweigh any advantage to employers in rushing to settlement and insulating those settlements from later challenge. The EEOC failed to articulate why a case-by-case review of proposed waivers and settlements is not preferable to a blanket insulation of such settlements as to all employers and all workers.

(5) The EEOC's apprenticeship exclusion continues to weaken the Act. When the EEOC took over enforcement of the ADEA from the Department of Labor in 1979, it inherited a practice of excluding apprenticeship programs from the Act's coverage. This means that employers are free to discriminate in favor of younger workers in staffing apprenticeship and training programs. In cases of plant closings and layoffs, older workers become disadvantaged because they have not received on the job training or do not qualify to receive it in the future.

In 1980 and again in 1984, EEOC general counsel advised the Commission that the apprenticeship exclusion lacks a foundation in the language of the ADEA, is contrary to congressional intent, and undermines the basic purposes of the Act. As a result, the Commission in 1984 proposed a rule eliminating the exclusion for apprenticeship programs. However, the Office of Management and Budget later reviewed the proposed rule and communicated its opposition to the rule to EEOC. On July 30, 1987 three of the commissioners followed the OMB directive and voted to terminate the rule-making.

It is illuminating to compare the Commission's stated reasons for dropping the apprenticeship rule with its reasons for adopting the rule on waivers of rights at the same meeting. The Commission argued that it should drop the apprenticeship rule because the practice of excluding apprenticeship programs had existed for the preceding 20 years, thereby implying congressional approval of it. However, the Commission adopted the rule permitting older workers to waive their rights and settle claims under the Act without EEOC supervision despite the absence of such a rule or practice in the Commission for the preceding 20 years.

The EEOC's other asserted grounds for dropping the apprenticeship rule was that Title VII of the Civil Rights Act, prohibiting discrimination on grounds of race and sex, has an explicit prohibition on discrimination in apprenticeship programs and that the ADEA, lacking an explicit prohibition, must be read to exclude apprenticeships. When it took up the waiver rule, however, the Commissioners voiced their desire to tailor the ADEA to Title VII (which permits unsupervised waivers and releases), but, at the same time, ignored the Fair Labor Standards Act which was the model for the remedy section of the ADEA.

All of this does not suggest the kind of careful and reasoned decision making designed to apply the resources of the Commission most effectively on behalf of the persons which the Act protects. It suggests an ad hoc effort to articulate whatever grounds are available in support of a predetermined position.

The EEOC's current record, therefore, invites further oversight of its litigation under the ADEA, particularly for the numbers of people assisted and the patterns of age discrimination attacked. In addition, EEOC rule making on positions favored by employers at the expense of older workers warrants the highest level of scrutiny by the Congress.

The **Chairman**. Thank you very much for your very thoughtful and reasoned testimony. As I said at the outset, this isn't a very happy hearing. It's a very discouraging hearing in that we're finding the lack of attention and the lack of enforcement of the law by the Commission is thwarting the rights and opportunities for the employees. And I find it most disturbing, as others of the committee have indicated that the Commission has fallen down on their job.

Thank you very much.

Mr. **Fretz**. I thank the Chairman.

The **Chairman**. The next witness will be Ms. Alice Quinlan, Public Policy Director of the Older Women's League.

STATEMENT OF MS. ALICE QUINLAN, PUBLIC POLICY DIRECTOR, OLDER WOMEN'S LEAGUE

Ms. **Quinlan**. Chairman Melcher, I'm Alice Quinlan, Public Policy Director of the Older Women's League.

OWL is the first national membership organization focused exclusively on midlife and older women. We thank you for calling this hearing and for giving us the opportunity to share our views with you. We have not made a comprehensive review of EEOC's operations, but wish to speak today as advocates for our constituents who are disadvantaged by inadequate enforcement of age and sex discrimination laws.

Like everyone else, most older woman need paid employment. Without jobs women can't qualify for Social Security disability benefits or for pensions, and without earnings we cannot build retirement savings.

Midlife and older women meet job discrimination at every point: In hiring, in training opportunities like apprenticeships, in promotion, benefit and discharge practices. And it isn't Mr. Chairman, just age discrimination that they face. It is an insidious and intertwined combination of both age and sex discrimination; in the case of older women of color, it's age and sex and racial discrimination intertwined. This "multiple jeopardy" job discrimination is not very widely recognized. And proving employment discrimination based on a combination of age and sex, or age, sex and racial discrimination is quite difficult.

Employers, for example, can point to their older workers—who are men. They can point to the women in their employ younger. And they can point to minority workers, both younger male or female employees, as evidence that they don't discriminate on the basis of age, or sex, or race. Meanwhile older women fall through the cracks. This discrimination continues despite the Title VII of the Civil Rights Act, and the Age Discrimination Employment Act.

Unfortunately, enforcement of these laws by the Equal Employment Opportunity Commission has been limited. For example, in the annual report for Fiscal Year 1984, which was released in June and appears to be the most recent report from the agency, EEOC received a total of 63,000 complaints that year, found no cause in about half of them, settled less than one-fourth of them, and filed a total of under 22 suits. Now 5 percent of all the charges received by EEOC during that year, and 20 percent of all the ADEA charges were concurrent Title VII/ADEA cases. That is, they were multiple jeopardy cases which could have been either age and racial discrimination, or age and sex discrimination. But the EEOC filed only a single lawsuit based on concurrent Title VII/ADEA charges.

The most frequently litigated ADEA cases involved "maximum hiring age and mandatory retirement age limitations for public safety occupations, such as law enforcement officers and firefighters." Needless to say, not many older women are found in these particular occupations.

Women complainants repeatedly tell us about problems that plague the handling of charges by the EEOC. In the remainder of my testimony I'd like to point out several of those.

Our members tell us that when they file a charge, the EEOC doesn't explain its procedures, or what the charging party's responsibilities are. One woman complained that there was a determination of "no discrimination" without the EEOC staff person ever even talking to her. We suggest that EEOC produce and distribute pamphlets which expain EEOC procedures and that there be a requirement for direct contact by the EEOC with the charging party.

Our members have complained that when employers don't produce requested documents, EEOC is very slow to seek court sanctions through its subpoena powers. Without such documents, it is extremely difficult or impossible to prove many charges. We recommend that EEOC seek sanctions more often so that employers will know that they cannot avoid producing these documents.

Our members have complained that if EEOC determines that discrimination did not occur, no explanation for that decision is given to them. Often the letter of notification is incomprehensible to lay persons who can't tell from the letter if they can file suit, and if so, whether or when they should do so. In our written testimony is an example of such a letter.

We suggest clearer letters and a name and telephone number of an EEOC contact person that's put right on the letter for follow-up questions.

As has been noted several times this morning, lawsuits must be filed within 2 years of an ADEA complaint. Our members complain that because EEOC takes so long to make its determination, there is often little or no time left to prepare or file such a suit before the 2 years expire. I think Professor Jungels' testimony includes a good example of this.

Charging parties, of course, can bring suit concurrently with EEOC action, but most people want to see what EEOC's findings are before they pursue an expensive case. Knowing about the likely delays keeps many older persons with even starting the complaint process. One Older Women's League member said to us, "Why should I even file a complaint?" I'll probably be dead before they finally decide."

And finally, our members complain that once a determination of "no discrimination" is made, they have difficulty obtaining a copy of their files from the EEOC so they can decide whether a lawsuit is merited. In one case, by the time EEOC finally responded with this information, the time for filing a lawsuit had already expired. We suggest a 2-week response time and the immediate opportunity for charging parties to be able to inspect their own files.

Now with less than a 50-50 chance of receiving relief at the administrative level, and virtually no chance of any attention to multiple jeopardy in the few cases filed by EEOC, older women must file these suits themselves. But relatively few private lawyers have experience with multiple jeopardy cases, certainly not on behalf of older women, and many individuals simply appear before the court without a lawyer.

I'm pleased to be able to say that the Ford Foundation has just awarded the Older Women's League a small grant for a project through which we will encourage private lawyers to pursue these multiple jeopardy job discrimination cases. But work by the private bar is no substitute for such enforcement that should be done by EEOC.

In closing, Mr. Chairman, I'd like to note that several members here this morning, Senator Heinz and I think several other Senators, alluded to changes that have been made by Congress within the last year: Abolishing mandatory retirement, improving the likelihood that workers will receive pensions (both the post-65 accrual change, shortening vesting time from 10 years to 5 years, and abolishing the so-called 5-year rule which had said that if a person joins an employer within 5 years of the retirement age, they could not join the pension plan). All of those changes were made by you with the goal of making it more likely that individuals will be able to have pensions in retirement. But those changes won't mean anything at all if there is inadequate enforcement of the laws that prohibit discrimination.

If, for example, because of the changes you've made, a woman (perhaps who is a displaced homemaker, is widowed) could return to the labor force at age 58 or 60, get a job with an employer who has a pension plan and stay in that job for the required 5 years and be able to vest a pension. But without enforcement of the laws that prohibit employment discrimination, those changes you made, while fine in theory, won't mean anything in practice. So for women especially, vigorous enforcement by EEOC of the laws that prohibit job discrimination is more important than it has ever been.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Quinlan follows:]

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STATEMENT OF THE OLDER WOMEN'S LEAGUE

presented to the

SENATE SPECIAL COMMITTEE ON AGING

at a hearing on

EEOC's Enforcement of the Age Discrimination in Employment Act

September 10, 1987

Senator Melcher, members of the committee. I am Alice Quinlan, Public Policy Director of the Older Women's League, the first national membership organization focused exclusively on midlife and older women. Founded in 1980, the Older Women's League now has 22,000 members and donors, and chartered chapters in 35 states. Through education, research and advocacy, our members work for changes in public policy to eliminate the inequities women face as they age.

We appreciate the opportunity to join you in this hearing on EEOC's Enforcement of the Age Discrimination in Employment Act. Members of the Older Women's League (OWL) have selected employment as a top priority for our organization. Our overall goals are to improve the likelihood that midlife and older women will be able to find adequate employment and to reduce the workplace discrimination they frequently encounter.

We are testifying today not as experts on EEOC's performance, but as advocates for our constituents who are disadvantaged by the lack of enforcement of age and sex discrimination laws.

As you and members of the Senate Aging Committee well know, Mr. Chairman, all too many women face poverty or near poverty at the end of their lives. In 1986, according to the U.S. Census Bureau, the median income of women over 65 was $6,400, only about $1,000 above the official poverty level. By comparison, the median income for men over 65 was $11,500.

The reasons for older women's low economic status are complex, but employment in the paid labor force is a central factor. Without jobs, women cannot qualify for Social Security disability benefits or pensions in their own name; without earnings, they cannot build savings. Like everyone else, most older women need paid employment. But they face pay inequities, occupational segregation and employment discrimination stemming from deeply rooted attitudes about the value of women's work in the home and in the paid workplace.

Midlife and older women meet job discrimination at every point: in hiring, promotion, benefits, and discharge. And it is not just age discrimination they face, but an insidious combination of age/sex or age/sex/race discrimination.

More than half of all women in their 50s and 8% of women over 65 are in the paid labor force. A significant proportion of midlife and older women workers are underemployed--stuck in low paying jobs with few or no benefits and no prospects. For persons in full-time employment, weekly earnings decrease with age and are substantially lower for women than for men. In 1986, employed women between 45 and 54 averaged $308/week, while women over 65 averaged $255/week; the comparable figures for men were $505 and $358.

Many who need and want to be employed cannot find jobs. The problems of unemployed older workers are often overlooked because, as a group, they have lower unemployment rates than younger workers. But these unemployment rates are misleading because they do not account for the large number of discouraged midlife and older women.

For example, in the second quarter of 1985, nearly 100,000 women 60 years and older became discouraged workers. Nearly a third of these women indicated that they believed employers thought they were too old, and over one half of them attributed their unemployment to job market factors, such as no work available. The figures also don't show how many women need full-time work but are only able to find part-time jobs. Older women of color are particularly vulnerable to this problem.

Official unemployment rates also do not accurately reflect the difficult circumstances of displaced homemakers. Faced with the sudden need to be the sole provider for themselves and their families because of widowhood, divorce, or the loss of AFDC, they are entering the job market late in life with little recent paid work experience. Of an estimated five to six million women in this category, half are not yet in the labor force, and most of the other half are underemployed--either working full-time for below minimum wage or working part-time involuntarily. Nearly three-fourths of displaced homemakers are women over 40, and about half are over age 55.

Intertwined age and sex discrimination compound these problems for many midlife and older women, with older women of color facing the triple jeopardy of age, sex, and racial discrimination in employment. While some progress has been made in combatting discrimination against younger female employees, older males and minorities, older women continue to fall between the cracks. Multiple job discrimination is not widely recognized. The National Commission for Employment Policy has noted the virtual "nonexistence of studies on the topic of multiple jeopardy."

One reason for the scarcity of research is that employment discrimination based on age/sex or age/sex/race is difficult for an individual to prove. As evidence that they do not discriminate on the basis of age, sex, or race, employers can point to their older (male) workers, (younger) women, and (younger male or female) minority workers. Meanwhile, discrimination against older women continues.

OWL receives many requests for help and expressions of frustration from women on this issue. The following excerpts from correspondence are typical:

> "I am in my 50's. Six months ago I was involuntarily terminated from my job, due to a reduction because of 'reorganization and reallocation of resources.' I lacked two years of having vested rights in a pension, which I lost along with all other benefits. I was not offered another position, although they continue to hire temporary help. I am a capable, dependable and conscientious worker."

> "I have had about 25 job interviews for positions I am well qualified for, but who will hire a 58-year old woman when they can hire a young woman half my age?"

> "For 11 years I worked in the steel industry. I was laid off in 1981 because I did not have enough seniority and as a result I lost all benefits. I've tried getting a job but am not being hired. I'm told that I'm 'overqualified.' I know that I'm being discriminated against, but I can't prove it."

> "I'm 64 and it is very difficult for an older women to get even temporary or part-time work. I'm a capable, reliable worker, but can't find a steady job and I'm ten years younger than the President of the United States. I've found if I scan the classifieds and find a job with miserable hours, weekends, etc. where there are few applicants, I can sometimes get temporary jobs."

Discrimination continues despite Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act (ADEA) of 1967, and other state and local laws designed to combat it. But equal access to jobs, benefits, and promotions is greatly diminished by limited enforcement of these laws by the the Equal Employment Opportunity Commission.

For example, in the annual report (FY 1984) released by EEOC in June 1987, more than half of the ADEA and ADEA/Title VII complaints received were judged to be "no cause/no violation." EEOC received a total of 63,000 complaints that year, found no cause in nearly half of them, settled less than one-fourth, and filed a total of 222 suits. In FY 1984, 5% of all the charges received by EEOC --and 20% of all the ADEA charges--were concurrent Title VII/ADEA cases (which could be age/race or age/sex). But the EEOC filed only a single lawsuit based on concurrent Title VII/ADEA charges.

Suits filed by the EEOC in FY 1984

Title VII	130	
ADEA	67	
Equal Pay Act	25	
Title VII and EPA	17	[included in EPA total]
Title VII and ADEA	1	[included in ADEA total]

Even if they filed only ADEA charges at the EEOC, older women did not fare well. The agency's report states that the most frequently litigated cases involved "maximum hiring age and mandatory retirement-age limitations for public safety occupations, such as law enforcement officers and firefighters."

In addition to these concerns, women complainants repeatedly tell us about general problems that plague the handling of charges by the EEOC. They include excessive delays in responding to complaints, failure to explain its procedures and decisions, and difficulty in gaining access to information and files.

- Procedures--Our members complain that when they file a charge, the EEOC gives no explanation of its procedures or what the charging party's responsibilities are. One woman complained that there was a determination of "no discrimination" without the EEO counselor ever talking to her. We suggest the production and wide distribution of pamphlets explaining EEOC procedures, and a requirement for direct contact by the EEOC with the charging party.

- Access to documents--Our members have also complained that when employers do not produce requested documents, EEOC is slow to seek court sanctions through its subpoena powers. Without such documents, it is difficult or impossible to prove many charges. We recommend that EEOC seek sanctions more often so that employers will know they cannot avoid document production.

- Explanations of Decisions--Our members complain that if EEOC determines that discrimination did not occur, no explanation for the decision is given to the charging party, and often the letter of notification is incomprehensible to lay persons. For example, the following letter from the EEOC was received by one of our constituents.

"This is to inform you that the Commission has made a determination that it will not proceed further with its processing of your charge under the Age Discrimination in Employment Act because the investigation did not disclose that you were retaliated against, as alleged.

The fact that the Commission will take no further action does not affect your right to take legal action on your own behalf. The Act provides that a private lawsuit [can be filed after the]* expiration of 60 days from filing of a charge or the conclusion of Commission action if earlier. The Act provides further, that a two-year limitation period is imposed on recovery of unpaid compensation (three years in the case of a willful violation). The applicable statute of limitations in any specific case is a matter for the Courts to decide."
*this phrase was omitted

From this letter, our member could not decide if she could file suit, and if so whether or when she should do so. We suggest clearer letters and a name and telephone number of an EEOC contact person for follow-up questions.

- Delays--As the letter above notes, lawsuits must be filed within two years of an ADEA complaint. Our members complain that EEOC takes so long to make its determination, there is often little or no time left to prepare or file suit before the two years expires. Although charging parties may bring suit concurrently with EEOC action, most want to see EEOC's finding before pursuing an expensive lawsuit. Widespread knowledge of likely delays precludes many aggrieved older persons from even starting the process. One OWL member told us, "Why should I even file a complaint; I'll be dead before they decide."

- Obtaining Files--Finally, our members complain that once a determination of "no discrimination" is made, they have difficulty obtaining a copy of their files from the EEOC so they can decide whether a lawsuit is merited. In one case, by the time EEOC finally responded with this information, the time for filing a lawsuit had already expired. We suggest a two-week response time and the immediate opportunity for charging parties to inspect their files.

With less than a 50-50 chance of receiving relief at the administrative level, and virtually no chance of any attention to multiple jeopardy in the few cases filed by EEOC, older women must themselves file suit. The Legal Services Corporation provides virtually no help, few private lawyers have experience with multiple jeopardy cases, and many individuals simply appear before the court pro se. Without legal assistance and support, older women cannot act to remedy their situations, and employers can discriminate with near impunity.

The Older Women's League is beginning a project, funded by the Ford Foundation, to encourage the private bar to pursue multiple jeopardy employment discrimination cases, since the EEOC has been so lax in its enforcement.

As I stated at the outset, our critique of the EEOC's performance is not based on a comprehensive review of its operations, but on the views of our members who cannot find redress through the EEOC for the job discrimination they encounter. We are certainly not convinced older women are any better off now with respect to job discrimination than they were prior to passage of the ADEA.

But it is now more imperative than ever to enforce laws prohibiting job discrimination. As you know, in 1986 Congress passed laws abolishing mandatory retirement and improving the odds that workers will receive pensions. But these changes will mean nothing to midlife and older women if they are unable to find or keep jobs because of job discrimination. For women especially, vigorous enforcment by EEOC of laws prohibiting job discrimination is critically important.

The CHAIRMAN. Has your organization made formal recommendations to the Commission?

Ms. QUINLAN. No, sir. We have not yet done so, but I think we would very much like to. We have a very fine advisory panel to our Ford Foundation project and we hope to get further ideas from them, and that might be one of the outcomes of the projects.

The CHAIRMAN. Your membership has complained that it's difficult after having filed a complaint with the Commission to determine what the Commission is going to do. Just how does that work?

Ms. QUINLAN. Well, the individuals don't understand the process that's taking place. The communications aren't clear—I think we've had some very good examples of some of the confusion that arises from the testimony of the three witnesses earlier this morning, of their confusion at various points, of getting different information from different representatives who told them different things and not really knowing what's what. And I might say that that confusion is compounded even further when an individual is filing a case that's both an age and a sex discrimination case, because of the differing regulations and prescriptions that apply to the two different types of cases.

The CHAIRMAN. When a complaint is filed and eventually the Commission responds that there's no violation, is there any explanation provided why there is no violation?

Ms. QUINLAN. No.

The CHAIRMAN. Just a simple letter that states that's——

Ms. QUINLAN. That's correct, that there is no explanation of the decisions. Often we have heard from people who were hurt as much as anything else, saying "Could they have just told me why? I don't understand why. If there had been some explanation, I might have been satisfied with it." But just to say no, the determination of no cause, leaves people hanging.

The CHAIRMAN. Is there any one-on-one interfacing between the Commission, or an employee of the Commission and the person making the complaint?

Ms. QUINLAN. I gave you, in our testimony, the example of one woman whose case was determined to have no cause, who had never been interviewed or had any direct contact. I really don't know, Senator, how widespread that is.

The CHAIRMAN. Is this example you've given, is it typical?

Ms. QUINLAN. I don't know. I would be very glad to try to get some additional information and give it to you for the record, if you'd like.

The CHAIRMAN. Does an individual have a right to go to Court after getting a letter from the Commission which says that there's no cause, or no discrimination?

Ms. QUINLAN. Yes, assuming that the time limit isn't up. They have two years to file that complaint and if there are great delays in EEOC giving their ruling, and if the person has decided that they want to hear what EEOC says before they go to the expense of filing suit, very often the time is used up. They can certainly, by law, file it concurrently so that they're pursuing a private case at the same time as EEOC is working on it. But many people don't do that, and I think it's particularly true of less sophisticated and less well educated people who really do have a sense of, "This is a Government agency, they're going to look into my case, they're fair, they're going to be able to look at this dispassionately and tell me whether I really have a case or not." It's particularly true for people who don't have much money for a private lawyer. So they want to see, "How does EEOC come out on this before I decide whether I'm going to file suit." If much or virtually all of that 2 years has been eaten up by the process at EEOC, at the end the person either has very little or in many instances no time at all to file.

The CHAIRMAN. This matter of obtaining the files, then, becomes quite pertinent I would imagine if the Commission has determined that there is no discrimination. A person is entitled to obtain their file from the Commission, are they not?

Ms. QUINLAN. Yes, they are. Again, there are such delays there that the information is often not available to the individual who wants to consider it before deciding whether they will go to the expense and the hassle of a private lawsuit.

The CHAIRMAN. And so maybe be thwarted again then from filing the suit in a timely manner within the statute of limitation?

Ms. QUINLAN. That's right.

The CHAIRMAN. Well, we've got a lot of unanswered questions, and a lot of confusion. I want to thank you very much, Ms. Quinlan, for your testimony.

Ms. QUINLAN. Thank you.

The CHAIRMAN. Our next witnesses are Mr. Clarence Thomas, Chairman, and Mrs. R. Gaull Silberman, Vice Chairwoman, Equal Employment Opportunity Commission.

Mr. THOMAS. Senator, we provided written testimony for the record, and I think that we need not repeat that. We have opening statements that are brief statements. I will read mine and Vice Chairman Silberman will read hers.

The CHAIRMAN. Please proceed.

STATEMENT OF CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY MRS. R. GAULL SILBERMAN, VICE CHAIRWOMAN, EEOC, AND CHARLES A. SHANOR, ESQ., GENERAL COUNSEL, EEOC

Mr. THOMAS. The age discrimination charges, Mr. Chairman, filed with EEOC are rapidly increasing in number. In addition, a growing percentage of our lawsuits are filed under ADEA. This Commission has greatly increased over previous amounts, the monetary benefits recovered through compliance and litigation on behalf of victims of age discrimination.

At this point I'd like to address one concern that I saw raised. And that was the number of individuals benefited. The numbers of individuals benefited, as well as the monetary recoveries were reduced because of my concern about the inflation of those numbers prior to my tenure, and a much, much more conservative approach was applied both in generating or in calculating the monetary benefits, as well as the number of individuals helped.

Fiscal Year 1980 was the first full fiscal year EEOC had enforcement jurisdiction over ADEA. That year 18.6 percent of our charges were filed under ADEA. By Fiscal Year 1986 age charges had risen to 25.3 percent of our receipts. Over the same period, monetary benefits secured by EEOC through compliance under ADEA rose from 21.5 percent of the total to one-third of all compliance benefits. Age cases rose from 14 to 26 percent of all lawsuits filed by the agency between 1980 and 1986. At the same time monetary benefits under ADEA rose from 11 to 79 percent of all monetary benefits recovered by EEOC through litigation. In Fiscal Year 1986 EEOC recovered $54.7 million through compliance and litigation on behalf of victims of age discrimination, which was more than half of the total, $100.2 million recovered by EEOC under all statutes that same year.

This Commission has adopted unanimously a number of policies and programs to establish EEOC as an effective, credible law enforcement agency. These measures ensure that age and all other discrimination cases are handled in the most effective and efficient means possible. In addition a number of administrative and management tools have been employed by this Commission to support the agency's enforcement program. The Commission also has developed unique outreach programs to augment the deterrent effect of our enforcement, including a forthcoming satellite seminar that would be our largest outreach effort, which includes, by way of information, one member of this committee in the telecast.

Mr. Chairman, at about 4 o'clock in the afternoon of September 3 I received a list of 59 questions which this committee wanted answered by the close of business September 8th. Because of the Labor Day weekend our staff had 2 working days to pull together a huge volume of information and material. We have submitted what we could on such short notice and with all-nighters by a number of individuals, and we will provide the remainder, or as much as possible, in the future. However, I add that the EEOC staff is approaching overload in attempting to respond to the enormous volume of requests for data and information from Members of Congress, Congressional committees, and the GAO. Staff time which could be spent, in my opinion, enforcing the laws against employment discrimination and correcting the problems at EEOC increasingly is being used to compile data in every conceivable combination and permeation for Congress or GAO.

EEOC's enforcement statistics are a matter of public record and we gladly provide the information we have available to anyone who asks. However, we do not routinely keep statistics in forms that are of no use to us. In the future if the committee staff would simply ask us what they want to know, we probably can provide the information in a form that is already available without taking so much of your time and ours. And it would help if they would develop a working relationship with us rather than a combative cloak and dagger appraoch, including I might add, calling one of our career employees at home and suggesting that they're being intimidated on the job and cannot be called there.

Vice-Chairman Silberman will address the issues of waivers and apprenticeship under ADEA in more depth. However, there is one additional regulatory issue which was not included in your request for testimony, that of post-normal retirement age pension benefit accruals. When enforcement authority of the ADEA was transferred to EEOC in 1979, the agency inherited a Department of Labor interpretive bulletin that allowed employers to cease pension accruals for employees beyond normal retirement age. In March 1985 this Commission approved proposed rules that would have rescinded the interpretive bulletin and adopted new rules.

As a result of the law mandating pension accruals beyond normal retirement age enacted by Congress last October, the Commission voted on November 10, 1986, to cease its regulatory process and devote its resources developing rules to implement the new law. Despite the fact that this Commission had taken more action on the issue of pension benefits accruals than any previous Commission, the American Association of Retired Persons had filed a lawsuit in the spring of 1986 alleging that EEOC had unreasonably delayed action on pension accruals. When Congress enacted legislation in the fall, the suit became a challenge to EEOC's final authority to cease its regulatory process. The U.S. Court of Appeals, the D.C. Circuit, found that EEOC was acting within its authority and that AARP, while entitled to see that EEOC acts in lawful manner, cannot compel it to act in a particular way. The court remanded the case back to the District Court allowing EEOC to take whatever further action it may deem appropriate on the pension accrual issue.

And finally, I would like to add a general observation and comment. Many of the policy issues that we debate at EEOC and discuss were not envisioned when the laws themselves were passed. They are very difficult issues. If they were not, they would not create controversy. During my tenure I have insisted on the highest degree of professionalism in making policy. Since others may disagree they are entitled to criticize. However, to suggest that we are derelict in carrying out our responsibilities is an adhominem attack that impugns my integrity, our integrity as much as or more than it questions our judgment. I've been Chairman of EEOC long enough to know that accepting these attacks comes with the turf. However, I urge this committee to understand that much of the disagreement over tough issues such as apprenticeship and waivers, where we have made and documented the basis for our decisions, can be resolved more appropriately through specific legislation in much the same way the post-normal accrual issue was resolved.

We have given these issues our most serious consideration and our best judgment. In spite of the veiled threats of lawsuits and public denunciations, such as this hearing, though we do not expect total agreement or merit castigation, we are prepared to defend EEOC's record and our judgment.

Thank you.

[The prepared statement of Mr. Thomas follows:]

TESTIMONY
OF CHAIRMAN CLARENCE THOMAS
AND VICE CHAIRMAN R. GAULL SILBERMAN
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE SENATE SPECIAL COMMITTEE ON AGING

SEPTEMBER 10, 1987

The Equal Employment Opportunity Commission is proud of its record of vigorously enforcing the Age Discrimination in Employment Act. In 1979, the Commission was given enforcement authority for the ADEA. Since that time the number of age discrimination charges has increased at a greater rate than any other category. This new challenge came at a critical time for the agency. Foundering under an ever increasing work load, the Commission implemented major initiatives in policy and management to establish the credibility and predictability of the agency's law enforcement efforts, in order to better fulfill our responsibilities under all four of the acts we enforce. The Commission decided that this task could only be accomplished through a strong litigation program and a policy of seeking full relief for victims of discrimination.

The Commission's major policy initiatives include:

. an enforcement policy which calls for every case of discrimination which fails conciliation to be presented to the Commission for litigation consideration;

. a remedies policy which calls for a full remedy to be sought in every case where discrimination is found;

. an investigative compliance policy to enable EEOC to deal more effectively with respondents who fail to cooperate with Commission investigations; and

. a method for charging parties to appeal to EEOC headquarters determinations by field offices that no cause has been found to believe discrimination has occurred.

A number of administrative and management tools have been employed by this Commission to support the agency's enforcement program. Among those tools are improved financial accountability, computerization, goal-oriented employee performance agreements, a streamlined organizational structure and implementation of a Commission-wide quality assurance program. In June, EEOC for the first time in Commission history comprehensively trained virtually all (1,400) field investigators. Comprehensive training of investigators has now been institutionalized. This training program is another important element in the Commission's ongoing work to improve the quality, effectiveness and efficiency of its service to the public.

The Commission also has developed unique, personalized outreach programs designed to augment the deterrent effect of its enforcement through public education and assistance.

Predictable, efficient law enforcement and insistence on full remedial relief have benefitted victims of age discrimination. As Congress recognized in enacting the ADEA, those who suffer from age discrimination must have prompt vindication of their rights for any legal relief to be meaningful. Accordingly, this Commission has aggressively investigated and prosecuted claims of age discrimination on an individual, classwide and a systemic basis.

The Age Discrimination in Employment Act is a developing area of law. As a result, we have employed our substantive rulemaking authority in areas such as waivers under ADEA to augment our enforcement program.

Statistics on the numbers of cases satisfactorily concluded, lawsuits initiated, and monetary recoveries obtained clearly show this Commission's commitment to eradicating age discrimination and the public's growing trust in our processes, as well as our credibility as a law enforcement agency.

We are pleased to keep this Committee informed of the Commission's record of accomplishment and commitment to the purpose of the ADEA: to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

ENFORCEMENT: LITIGATION AND COMPLIANCE

EEOC's Efficiency and Effectiveness in the Processing and Adjudication of Age Discrimination Complaints; EEOC's Performance in Administering the ADEA and in Ensuring Compliance with the Act.

FY 1986 was a year of unprecedented litigation activity for the EEOC. A record 526 actions were filed in federal district courts. Of these, a record 109 were lawsuits filed under the ADEA. More than 25 percent of all cases filed in FY 86 were class actions; of these, more than 40 percent were age cases.

These figures are perhaps better appreciated through comparison with FY 1980 figures. FY 1980 was the first complete fiscal year of EEOC enforcement jurisdiction. In FY 80, 59,328 charges were received by the EEOC; 18.6 percent (11,076) were filed under ADEA. In FY 86, 68,822 charges were received, and 25.3 percent (17,443) were filed under the age Act. In FY 1980, $57,320,000 in monetary relief were recovered by the EEOC through compliance; $12,312,000 (21.5 percent) were for victims of age discrimination. In 1986, the benefits for age discrimination victims increased to one-third ($18,050,000) of a total $53,840,000.

Litigation followed a similar pattern. In 1980, the Commission filed 326 lawsuits, 47 (14 percent) under the ADEA. In 1986, 109 (or 26 percent) of the 427 lawsuits were age cases. A comparison of monetary relief gained through litigation in 1980 and in 1986 is even more dramatic. In 1980 the EEOC recovered $20.9 million; $2.3 million (11 percent) went to victims of age discrimination. In 1986 the EEOC recovered a total $46.4 million through litigation, 79 percent or $36.6 million under the age Act. That is, in 1986 this Commission recovered more money under the age Act than was recovered in 1980 under all four statutes.

The U.S. Equal Employment Opportunity Commission has emerged into its third decade with dynamic, vigorous enforcement of the laws against employment discrimination. In remarkably short time -- from 1982 to the present -- this Commission has turned an organization that selectively administered civil rights laws into a law enforcement agency dedicated to seeking justice in every case of discrimination it finds.

WAIVER RULE

EEOC's Rationale and Justification for its Recent Adoption of a Rule to Permit Employee Waivers and Settlements of ADEA Private Rights without EEOC Supervision and Approval.

On July 30, the Commission voted unanimously to adopt a regulation to allow employees to sign waivers and releases of private rights under the ADEA without mandatory EEOC supervision. The new rule, which will become effective September 28, removes a legal and bureaucratic impediment to the voluntary settlement of ADEA claims when settlement is in the mutual interests of employee and employer. The rule thus subjects ADEA waivers to the same standards and procedures as waivers under Title VII of the Civil Rights Act of 1964. The rule goes further to spell out particular criteria for ensuring that any waiver of ADEA rights is entered into knowingly and voluntarily, without fraud or duress. The rule prohibits releases of prospective claims.

The Commission initiated this rulemaking in response to recent interpretations of the ADEA, in particular a 1985 decision of a panel of the Sixth Circuit Court of Appeals in Runyan v. NCR, holding that certain private waivers were invalid because they had not been supervised by EEOC. Section 7(b) of the ADEA incorporates the enforcement procedures of the Fair Labor Standards Act into the ADEA. Because case law under the FLSA does not permit contractual releases of FLSA rights without government supervision, the Sixth Circuit panel in the *Runyan* case declared that ADEA rights could not be waived by a private unsupervised release. Other cases, however, had enforced private ADEA releases under the same standards as Title VII.

The EEOC has never had a general process or procedure for supervising and approving each and every private waiver of ADEA rights, when no charge of discrimination has been filed. In fact, given the EEOC's workload and budgetary constraints, it is questionable whether an appropriate procedure could have been implemented without subjecting employees and employers to significant and inappropriate delays. Private ADEA settlements generally have been entered into without government oversight. The same has always been true, of course, of settlements of other types of employment discrimination claims under Title VII. More important, the Commission could discern no public policy interest that would be served by requiring blanket EEOC supervision of all ADEA releases, nor was there any evidence of legislative intent for imposition of such a far-reaching requirement.

In the wake of the uncertainty following the inital *Runyan* decision, the Commission determined its rulemaking authority under ADEA was a particularly appropriate mechanism to resolve these issues. A law enforcement agency can be effective and credible only if its actions are consistent and predictable, and a well-crafted rule can provide the clear guidance necessary to make this possible. The rulemaking process provides an opportunity for all interested parties to comment, which is especially important where the issues are complex. The Commission's objectives in initiating the waiver rulemaking were two-fold: to ensure that older workers are not precluded from exercising their rights under the ADEA by arbitrary, unnecessary bureaucratic barriers, and to provide clear, certain legal standards for allowing releases and ensuring they are knowing and voluntary.

Since publication of the Commission's Notice of Proposed Rulemaking on waivers, the Court of Appeals for the Sixth Circuit sitting *en banc* has reversed the panel decision in *Runyan* and held the ADEA waiver in that case was valid despite the absence of government supervision. Three other federal appellate courts recently have held that unsupervised waivers are valid under the ADEA if they are knowing and voluntary. One of these, *EEOC v. Cosmair, Inc.*, was particularly important to the Commission because it is the first decision to vindicate our position that a *private* waiver cannot affect the EEOC's ability to protect the *public* interest in eliminating age discrimination. The Fifth Circuit upheld the Commission's position that a waiver cannot prevent an employee from filing an age discrimination charge with the EEOC, whether to alert the EEOC to a pattern and practice of age discrimination or to challenge the waiver as not knowing and voluntary. The court held that employees are protected from retaliation if they seek to challenge an executed waiver. The Commission's final rule incorporates this very important principle and the Commission thereby hopes to forestall litigation over this issue that would impede enforcement of the ADEA.

In adopting the waiver rule, the Commission relied on Congress' declaration in section 2(b) of the ADEA that one of its purposes was to encourage employers and employees to "find ways of meeting problems arising from the impact of age on employment." The legislative history of ADEA as well as subsequent court decisions emphasized the importance to older workers of voluntary settlements under ADEA and expeditious resolutions of disputes.

Requiring government supervision of releases where both parties agree would, in the Commission's view, seriously infringe upon the rights of employees to obtain additional benefits as expeditiously as possible, and tend to discourage employers from offering such enhanced benefits to older workers.

It is important to emphasize the safeguards provided by the rule. First, the rule does not affect the rights of victims of age discrimination who do not wish to settle their claims. Second, those who desire EEOC supervision of their settlements are free to obtain the rule simply removing any requirement that supervision is mandatory for everyone. Third, as noted previously, the rule makes it clear that the right to file a charge or participate in an EEOC investigation is absolutely protected and that private waivers and releases do not affect the EEOC's rights and responsibilities to enforce the ADEA. Fourth, in response to public comments received during the rulemaking process, the rule sets out factors indicating what may constitute a knowing and voluntary waiver:

- that the agreement was in writing, in understandable language, and clearly waives the employees' rights of claims under the ADEA;
- that a reasonable period of time was provided for employee deliberation, and
- that the employee was encouraged to consult an attorney.

As these factors demonstrate, the Commission's intent in promulgating this rule is to allow only truly voluntary, knowing waivers. The Commission stands ready to indicate the rights of anyone who is forced into signing a release involuntarily without a reasonable time to make a knowing decision.

An issue that raised considerable concern after publication of the Notice of Proposed Rulemaking was whether the rule would sanction releases of prospective claims. It never was the Commission's intent to allow such releases. Because Title VII case law so clearly disallows prospective releases, the Commission did not believe it necessary to spell this out in the NPRM. However, in response to the comments, the final rule enunciates this fundamental principle and thus gives the rule greater certainty and clarity.

Another issue that raised concern was the last sentence of the NPRM, which stated:

> No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act.

Several commenters asked that this sentence be removed or revised to say that the Commission would not seek relief for individuals who have released their ADEA rights.

This rulemaking is intended to give older workers freedom to act in their own self interest, without government interference, but it also preserves the government's freedom to intervene wherever and whenever necessary to combat age discrimination. The Commission will investigate challenged waivers to determine whether they are knowing and voluntary, or whether they are an attempt to conceal age discrimination. And the Commission will vigorously enforce the ADEA to protect the public interest. A valid private settlement will not prevent the Commission from seeking to eliminate a pattern and practice of age discrimination or obtaining relief for victims.

Indeed, without this rulemaking, scarce Commission resources would be needlessly diverted from this important task. No benefit is to be gained by universal supervision of ADEA settlements, extending the government's oversight even to the vast majority of such cases where the parties are mutually satisfied. The Commission's rule allows our resources to remain focused on vindicating the rights of victims of age discrimination, thereby enhancing the EEOC's effectiveness and efficiency as a law enforcement agency.

APPRENTICESHIP PROGRAMS

EEOC's Rationale and Justification for its Recent Decision to Exclude Apprenticeship Programs from ADEA Coverage

On July 30, the Commission voted to leave in place a long-standing interpretation of the ADEA which allowed apprenticeship programs to be excluded from coverage. This action ended the Commission's review of a Department of Labor interpretation, adopted in 1969, that *bona fide* apprenticeship programs are not subject to the ADEA. After careful study, the Commission has determined, based on our assessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that when enacting the ADEA Congress did not intend to subject *bona fide* apprenticeship programs to the prohibitions of the Act.

The ADEA as passed by Congress in 1968 and subsequently amended did not mention apprenticeship programs. Whether such programs were covered was left to the Department of Labor to address. In a 1969 interpretive regulation, the DOL determined that such programs were not covered. This interpretation was in effect for ten years. In 1979 when enforcement authority for the Age Act was given to EEOC, the Commission took under advisement the matter of apprenticeship programs and in 1980, issued for comment a proposed rule that would have reversed DOL's position, extending ADEA coverage to apprenticeship programs. But, in 1981, after careful consideration and review, the Commission voted to retain DOL's position.

This long standing interpretation was was successfully challenged in 1983, in *Quinn* v. *New York State Electric and Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y.). As a result of that District Court decision and prior staff discussion, a reconsideration of the interpretation was begun. The Commission decided to begin the process necessary to rescind the interpretation and to apply the Act to apprenticeship programs through the issuance of a legislative rule, despite a May 1984 letter from DOL recommending against such a course.

Pursuant to Executive Order 12291, the proposed rule was submitted to OMB in July 1984. OMB returned the rule for reconsideration in December 1985, expressing concern that prohibiting apprenticeship programs from imposing age limits might prevent employers from recovering the cost of the training over an apprentice's work life. OMB stated its concern that this might stifle the creation of new programs and even result in the termination of existing ones -- leading to a general reduction in apprenticeship opportunities for all workers. Activity with respect to that rulemaking ceased until July 30 of this year when the Commission voted to discontinue the rulemaking. The question of age limits in apprenticeship programs presents a difficult policy question involving the balancing of many competing factors. While the Commission was not unmindful of these concerns, in the final analysis we believed that our determination must be based first and foremost on our reading of Congressional intent both from the statute and its surrounding history as summarized below.

The National Apprenticeship Act, or Fitzgerald Act, was the first federal statute dealing with apprenticeship programs. That law directed the Secretary of Labor to cooperate with state agencies in regulating apprenticeship, but it did not directly address the issue of age restrictions. Many programs had traditionally utilized and continued to impose such restrictions, and DOL made no objection.

The first significant federal attempt to legislatively eliminate the use of age restrictions by apprenticeship programs was the proposed Equal Employment Opportunity Act of 1962, H.R. 10144. This early draft of Title VII contained a prohibition much like that in the current Section 703(d) of Title VII prohibiting discrimination in admission to or employment in apprenticeship programs based on all the Title VII bases *plus* age.

However, Title VII of the Civil Rights Act of 1964, as finally enacted, did not apply to age, despite attempts to achieve that end in the House and Senate. Instead, Section 715 of the Act directed DOL to conduct an extensive study on age discrimination in employment. In 1965, the Secretary of Labor submitted the results of this study to Congress in a report entitled "The Older American Worker: Age Discrimination in Employment." The report made no mention of apprenticeship.

Following this report, Congress directed DOL to draft a bill to prohibit age discrimination in employment. The Secretary of Labor's draft bill adopted all the Title VII prohibitions intact, with the notable exception of those in Section 703(d) relating to apprenticeship and training. The prohibitions in Subsection 4(a) and (c) of the ADEA, covering discrimination in employment matters by employers and labor organizations, are the same as those in Subsection 703(a) and (c) of Title VII. However, no ADEA provision specifically addresses apprenticeship and training, as does Section 703(d) of Title VII, which specifically prohibits "any employer, labor organization, or joint labor management committee ...[from discriminating] in admission to, or employment in, any program established to provide apprenticeship or other training." In his letter transmitting the draft to Congress, the Secretary did not explain the reason for, nor alert Congress to, that omission.

Nor was the omission ever mentioned during Congressional consideration of the bill. The only references that do appear were in studies of state laws which were examined to determine which provisions and methods might best be incorporated in the federal legislation. The state law provisions on apprenticeship were summarized in those studies considered during Senate and House hearings. Congress was thus aware that certain state laws exempted apprenticeship programs, but did not enact a similar exemption in the ADEA.

This is not to say that Congress failed to consider the related issue of training, mentioned along with apprenticeship in Sec. 703(d) of Title VII but not in the ADEA. Rather, a number of legislators speaking in support of the ADEA seemed to place an emphasis on the employment of older workers rather than on their training. Many legislators stated that the purpose of the Act was to aid in the employment of older workers who already possessed the *training*, *skills*, and *qualifications* to perform but were denied opportunities because of stereotypical assumptions about age. Indeed, it was emphasized that Congress had already taken appropriate steps to provide for retraining of older workers where necessary.

As stated by Rep. Dwyer: [The bill's] enactment into law will be a fitting and effective companion to the bill we enacted last year which made special provisions for counseling, training, and placement services for older workers under the Manpower Development and Training Act ....[1] Similarly, Rep. Daniels stated: [The bill] fits in well with existing federal programs which are designed to help older workers upgrade their skills and become more competitive with younger workers."[2] Congress viewed the ADEA as a means of "provid[ing] relief *only when a qualified person* who is ready, willing and able to work is unfairly denied or deprived of a job solely on the basis of age."[3]

Conversely, the legislative history demonstrated that Congress clearly intended that the ADEA apply to age limitations for entry into management training programs notwithstanding the absence of express language in the Act covering such programs. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 4-5 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2217:

> The [House] committee declined to incorporate a specific exception for management training programs since it was believed so broad an exemption in the law might open a very wide door of possible abuse. Almost any training or opportunity for acquiring experience on a job might be construed as leading to future advancement to management positions. The committee recognizes, however, that bona fide age requirements do exist for some positions designed to give employees knowledge and experience which can reasonably be expected to aid in developing capabilities required for future advancement to executive, administrative or professional positions, and expects the Secretary to appropriately recognize such requirements.

In December 1967, the ADEA was passed into law. It became effective on June 12, 1968. The issue of apprenticeship was left for DOL.

The Commission has given considerable weight to the Department of Labor's interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA and in effect for the almost 20 years since. Moreover, under established principles of statutory construction, Congress is presumed aware of long standing interpretations of a statute, and when Congress has not acted to change such long standing interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: "... a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 N. 17 (1981), *citing Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 208, 210. Congressional silence during this period suggests its consent to the interpretation. *Id*. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. *Andrus v. Allard*, 444 U.S. 51, 57 (1979). Finally, with regard to other legislation, specific attempts to amend the National Apprenticeship Act to cover age discrimination introduced in the 98th Congress were not successful.

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[1] 113 Cong. Rec. 34751 (1967).

[2] 113 Cong. Rec. 34746 (1967).

[3] 113 Cong. Rec. 34747 (1967) (remarks of Rep. Dent) (emphasis added).

In light of these clear indications of legislative intent, the Commission determined that any change in the status quo in regard to apprenticeship programs is a policy determination properly left to Congress.

We emphasize that the Commission has determined that only certain apprenticeship programs are outside the scope of the ADEA (those that meet the standards of 29 C.F.R. 521.2 and 521.3).

These standards include but are not limited to: employment and training of apprenticeable trade; one year or more of work experience with progressively increasing wages which average at least 50 percent of the journeyman's rate over the period of the apprenticeship; submission of the apprenticeship program and apprenticeship agreement to the recognized apprenticeship agency for registration; adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning the progress of the apprentice; normally at least 144 hours a year of related instruction which is designed to provide the apprentice with the theoretical and technical subjects related to the trade.

Apprenticeship programs that do not meet all of the standards in 29 C.F.R. Subsections 521.2 and 521.3, summarized above, are fully subject to the ADEA.

In recognition of the need by older workers for protection from age discrimination in training programs generally, the Commission, when engaged in investigation, conciliation and enforcement, is committed to strictly scrutinize the challenged apprenticeship program to insure that it is in fact *bona fide* and is carrying out its stated purposes regarding the training of apprentices.

We are attaching copies for the record of the final rule on waivers under ADEA and of a letter to Mr. Burton D. Fretz of the National Senior Citizens Law Center on the issue of apprenticeship programs.

In conclusion, we want to emphasize our firm commitment, as is evident from our enforcement record, to enforcing ADEA as well as the other statutes under our jurisdiction. We'll be pleased to answer your question

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Approved by EEOC
7/30/87

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Legislative regulation and administrative exemption allowing for non-EEOC supervised waivers under the ADEA

Agency: Equal Employment Opportunity Commission

Action: Notice of Final Rule

Summary: The Commission hereby provides notice of a legislative regulation and administrative exemption (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. § 1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

Effective Date: (Insert date 30 days after publication in the Federal Register.)

For Further Information Contact: John K. Light at (202) 634-7643.

Supplementary Information: Section 9 of the ADEA, 29 U.S.C. § 628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission hereby promulgates a legislative regulation and administrative exemption under Section 9 of the ADEA and 29 C.F.R. § 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. § 621 et seq.

A Notice of Proposed Rulemaking (NPRM) regarding this rule was published in the Federal Register of Monday, October 7, 1985 (50 Fed. Reg. 40870) with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the right to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address whether it is necessary to develop particular standards to determine whether waivers are "knowing and voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the document, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence or absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a waiver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will look to the substance, not to the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> "No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act."

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA. *See Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly that release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." *Alexander v. Gardner-Denver Co.*, 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. § 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec. 7076 (Remarks of Sen. Javits); *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage emloyers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a paternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not wish to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (*see* *EEOC v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987) ("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 861 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (The *O'Neil-Schulte* line of cases "were tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (*Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (*see* *Brooklyn Savings Bank v. O'Neil*, *supra*). There is no such presumption under Title VII. *United States v. Allegheny- Ludlum Industries, Inc.*, *supra*; *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purposes of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Tile VII releases.

Recently, the Sixth Circuit Court of Appeals sitting *en banc* held that an unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, *cert*. *denied*, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, *O'Neil* and *Gangi* do not preclude an unsupervised waiver or release under FLSA or ADEA. *Accord* *Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's *Runyan en banc* decision with regard to unsupervised waivers under the ADEA and has incorporated that approach in the final rule. The Commission believes that the reasoning of the *Runyan en banc* decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the *Runyan en banc* decision (*see* *Lynn's Food Stores, Inc. v. United States Dept. of Labor*, 679 F.2d 1350, 1354-55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under Section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." Either a clear understanding of the nature of the rights being waived or the presence of an asserted claim could satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. See Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. See Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986); Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E. - D. C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S.1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. Alexander v. Gardner-Denver Co., 415 U.S. at 51; United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 856 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). In addition, the Commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. See Runyan v. NCR Corp., 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), aff'd, 787 F.2d 1039 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. Id. The plain language of section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, inter alia, filed a charge. See Id. at 5144. The enforcement policies underlying the ADEA strongly support this position. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806 (5th Cir. July 16, 1987); see Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis — Classification-Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission amends 29 C.F.R. § 1627.16 by adding a new subsection (c) to read as follows:

§ 1627.16 Specific exemptions:

. . . .

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

When assessing the validity of a waiver agreement, the Commission will look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this _____ Day of ________________ at Washington, D.C.

For the Commission

____
Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL 30 1987

Burton D. Fretz, Esquire
National Senior Citizens Law Center
2025 M Street, N.W., Suite 400
Washington, D.C. 20036

Dear Mr. Fretz:

This is in response to your Petition for Rulemaking and Other Action, filed with the Equal Employment Opportunity Commission on May 8, 1987. In your Petition, you requested that the Commission: (A) Rescind the interpretative rule set forth at 29 C.F.R. § 1625.13 and notify all affected members of the public that said rule is not subject to reliance under 29 U.S.C. § 626(e)(1); (B) Publish for public comment a notice of proposed rulemaking which was approved by the Commission on June 26, 1984, to be added at 29 C.F.R. § 1625.21; and (C) Publish a final substantive rule at 29 C.F.R. § 1625.21, 90 days subsequent to the publication of the above referenced proposed rule.

Pursuant to 5 U.S.C. § 555(e), you are hereby notified that the Commission has determined to deny your Petition. The more pertinent reasons for this decision are:

1. Pursuant to the Commission's Congressional mandate to administer and enforce the Age Discrimination in Employment Act of 1967, as amended ("ADEA" or the "Act"), it has determined, after careful reassessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that Congress when enacting the ADEA did not intend to subject bona fide apprenticeship programs to the prohibitions of the Act.

2. Congress patterned the ADEA after Title VII of the Civil Rights Act of 1964, as amended (Title VII). In fact, many of the substantive prohibitions of the ADEA were derived verbatim from Title VII. Lorrillard v. Pons, 434 U.S. 575 (1978). However, while sections 703(a) through (d) of Title VII, and sections 4(a) through (e) of the ADEA, address discrimination in employment, it is only § 703(d) of Title VII that specifically addresses discrimination in admission to, or employment in, programs providing apprenticeship or other training. Inclusion of § 703(d) shows that Congress intended Title VII to prohibit discrimination in apprenticeship programs on account of race, color, religion, sex and national origin, and that §§ 703(a) and (c) alone were considered insufficient to do so. If apprenticeship is covered by the ADEA, it would have to be under §§ 4(a) and (c) (sections virtually identical to §§ 703(a) and (c)). Yet, if the general language of §§ 4(a) and (c) were intended to be broad enough to reach apprenticeship programs, then the identical language of §§ 703(a) and (c) should have sufficed as well — clearly, however, Congress believed something more was necessary in Title VII in order to reach apprenticeship programs. The Commission believes that the inclusion of § 703(d) in Title VII, and the absence of a similar provision in the ADEA clearly demonstrates that Congress made a deliberate decision not to include apprenticeship programs under the Act. Furthermore, the fact that Congress saw a need for § 703(d) in Title VII illustrates that bona fide apprenticeship programs have been traditionally viewed as more in the nature of education and less in the nature of employment (apprenticeship has been traditionally recognized as an extension of the educational process to prepare young men and women for skilled employment). This factor is extremely important in that the ADEA and its legislative history reflect a Congressional concern exclusively for employment discrimination. The legislative history of the ADEA and the omission of a section similar to Title VII's § 703(d) indicate that Congress intended to provide retraining and counseling opportunities for older workers not by passage of the ADEA, but by the earlier passage of a companion Act, the Manpower Development and Training Act (since replaced by the Job Training Partnership Act).

3. In reaching its conclusion that Congress did not intend to cover apprenticeship programs under the ADEA, the Commission has given considerable weight to the Department of Labor's (DOL) prior interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA.

Under established principles of statutory construction, Congress is presumed aware of longstanding interpretations of a statute—here DOL's (since 1967) and the Commission's (since 1979) interpretation of the ADEA, and DOL's (since 1937) interpretation and implementation (allowing age restrictions) of the National Apprenticeship Act, 29 U.S.C. §§ 50 et seq. — when Congress has not acted to change such longstanding interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: ". . . a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n. 17 (1981), citing Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 208, 210. Congressional silence during this long a period suggests its consent to the interpretation. Id. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. Andrus v. Allard, 444 U.S. 51, 57 (1979).

4. The intent of Congress to leave bona fide apprenticeship programs outside the scope of ADEA coverage has also been reflected by its handling of other related matters. A number of bills have been introduced that would have prohibited age restrictions in apprenticeship programs, but all have been unsuccessful. For example, there were two bills introduced in the 98th Congress to amend the National Apprenticeship Act to this end, S. 981 (protecting individuals up to age 40) and S. 1751 (protecting individuals regardless of age). 98th Cong., 1st Sess. (1983). Also, in the 95th Congress, an unsuccessful attempt was made to amend Title VII to include age and handicap discrimination. Had it been successful, § 703(d) on apprenticeship would have applied to age discrimination as well. H.R. 3504, 95th Cong., 1st Sess. (1977). Finally, in 1975 Congress passed the Age Discrimination Act (ADA), prohibiting age discrimination by programs receiving federal funds. Congress structured the ADA, however, to exclude labor-management joint apprenticeship training programs. 42 U.S.C. § 6103(c)(1).

In denying this petition, the Commission wishes to emphasize that, as clearly stated in § 1625.13, only bona fide apprenticeship programs are outside the scope of the ADEA. In order to qualify as such, a program must satisfy the stringent standards set out at 29 C.F.R. §§ 521.2 and 521.3.

These standards include but are not limited to: employment and training of an apprentice in an apprenticeable trade; one year or more of work experience with progressively increasing wages which average at least 50% of the journeyman's rate over the period of the apprenticeship; submission of the apprenticeship program and apprenticeship agreement to the recognized apprenticeship agency for registration; adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning the progress of the apprentice; normally at least 144 hours a year of related instruction which is designed to provide the apprentice with the theoretical and technical subjects related to the trade. Apprenticeship programs that do not meet all of the standards in 29 C.F.R. §§ 521.2 and 521.3, summarized above, are fully subject to the ADEA.

In recognition of the need by older workers for protection from age discrimination in training programs generally, the Commission, when engaged in investigation, conciliation and enforcement, shall strictly scrutinize the challenged apprenticeship program to insure that it is in fact bona fide and is carrying out its stated purposes regarding the training of apprentices.

We appreciate the interest shown by the individuals and organizations supporting the Petition. Your comments have been most useful to us in our review of present Commission policy. As stated at the outset, however, our review has led us to conclude that the existing interpretation at 29 C.F.R. § 1625.13 correctly reflects the original intent of Congress with regard to the ADEA and bona fide apprenticeship programs. We believe that any change in that position is a determination properly left for the Congress.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

The CHAIRMAN. Well, Chairman, is it true that the number of commission employees has gone down?

Mr. THOMAS. Senator, the number of employees, if I may take a minute, were inflated in the last 30 days of 1980, and the first few days of 1981. Those numbers went down. The FTE went down somewhat that year. During my tenure the numbers have been pretty much the same. Now, we have come to the Hill with budget requests which would have kept our FTE numbers up around the 3,200, 3,300 mark. We have met with budget reductions in virtually every fiscal year on the Hill that I've been here.

This fiscal year our budget was increased by $26 million by the Administration. That has been halved already on the House side and normally what we get on the House side we also get on the Senate side, unless someone takes a particular interest or makes a special effort to increase our budget. The quick answer is yes. The total answer is that it is a combination of not only what our requests have been, but even more so, beyond the request, what we have received, the reductions that we've received in those requests.

The CHAIRMAN. Well, I've got your proposed staffing chart. That's your proposal for Fiscal Year 1987. And in Division I, in Systemic Litigation Services the Office of General Counsel, it seems that you have quite a few vacancies among the trial attorneys. Is that correct?

Proposed Staffing Chart
1987

SYSTEMIC LITIGATION SERVICES
OFFICE OF GENERAL COUNSEL

Title of Position	Service, Series and Grade	Position Description No.	Incumbent
Associate General Counsel	ES-905-04	H-3842	
General Attorney	GS-905-14	H-3847	
Secretary	GS-318-07	H-3850	
Division I			
Supv. Trial Attorney	GM-905-15	H-3844	
Supv. Trial Attorney	GM-905-15	H-3844	Vacant
Senior Trial Attorney	GS-905-14	H-3851	
Senior Trial Attorney	GS-905-14	H-3851	Vacant
Trial Attorney	GS-950-13	H-3852	
Trial Attorney	GS-950-13	H-3852	
Trial Attorney	GS-950-13	H-3852	Vacant
Paralegal Spec.	GS-950-11	H-3853	
Paralegal Spec.	GS-950-11	H-3853	Vacant
Paralegal Spec.	GS-950-09	H-3854	
Legal Clerk (Typing)	GS-986-05	H-3855	
Clerk Typist	GS-322-03	H-3856	Vacant
Clerk Typist	GS-322-03	H-3856	Vacant

[NOTE: This chart, indicating vacancies in the Office of Systemic Services, EEOC, was obtained from the Office of General Counsel, EEOC.]

Division II

Supv. Trial Attorney	GM-905-15	H-3844	
Senior Trial Attorney	GS-905-14	H-3851	
Senior Trial Attorney	GS-905-14	H-3851	Vacant
Trial Attorney	GS-905-13	H-3852	Vacant
Trial Attorney	GS-905-13	H-3852	
Paralegal Spec.	GS-950-11	H-3853	
Paralegal Spec.	GS-950-11	H-3853	
Paralegal Spec.	GS-950-11	H-3853	
Legal Clerk (Typing)	GS-986-05	H-3855	Vacant
Clerk Typist	GS-322-04	H-3857	

Division III

Supv. Trial Attorney	GM-905-15	H-3844	
Senior Trial Attorney	GS-905-14	H-3851	
Senior Trial Attorney	GS-905-14	H-3851	Vacant
Trial Attorney	GS-905-13	H-3852	Vacant
Trial Attorney	GS-905-13	H-3852	Vacant
Paralegal Spec.	GS-950-11	H-3853	
Paralegal Spec.	GS-950-11	H-3853	
Paralegal Spec.	GS-950-07	H-3853	
Legal Clerk (Typing)	GS-986-05	H-3855	
Clerk Typist	GS-322-03	H-3856	Vacant

Mr. THOMAS. That's correct. First of all, we allocate what we have. We don't allocate what we request in the budget. This is what we have. Our emphasis on litigation has been in the field. Most of our work and most of our cases come from the field. The major cases that we have had at EEOC don't come from the systemic trial team and have not come from that team. They have come from the litigation program that exists in our 22 district offices throughout the country.

Now I can, if you want a further answer on that specific staffing chart, refer to our general counsel, Charlie Shanor, who is here and can add to that. But again, our enforcement efforts are in the field and we have emphasized staffing and adding people to the field.

The second part of that is that rather than simply just take what we can get in bodies, we have made a specific effort to go out and recruit individuals, something that had never been done at EEOC, to use co-op programs, to use summer programs, so that we can get the best attorneys and the best investigators in the EEOC, rather than taking leftovers from other agencies.

The CHAIRMAN. Well, you made the case, I guess, in your response just now that EEOC should have people out in the field. And in reading from your memorandum to all District Directors and Regional Attorneys, dated August 18, 1987, "unfortunately a significant number of age cases being forwarded to the Commission for approval for litigation have statute of limitation problems. Over one-third of all the PM's submitted involve cases that are beyond the 2-year statute of limitation."

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

AUG 18 1987

MEMORANDUM

TO : All District Directors ✓
and Regional Attorneys

FROM : Charles A. Shanor CAS/B
General Counsel JT

James Troy, Director
Office of Program Operations

SUBJECT: ADEA Litigation and the Statute of Limitations

It is essential that the Commission, in our investigation of ADEA discrimination claims and in preparation of such cases for litigation, minimize the chance that any claims are barred by the statute of limitations. Unfortunately, a significant number of age cases being forwarded to the Commission for approval for litigation have statute of limitations problems. Over one third of all PMs submitted involve cases that are beyond the two year statute of limitations. A number of cases recently submitted were beyond the three year statute of limitations. The purpose of this memorandum is to advise you of this problem and to suggest steps that can be taken to correct it.

As you know, for an ADEA lawsuit to be timely, it must be filed within two years of the discriminatory act. 29 U.S.C. Section 255(a). If the violation is "willful," the statute of limitations is three years. Ibid. While the courts are divided over the proper standard for determining whether a violation is willful, 1/ the Justice Department has petitioned the Supreme

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1/ The courts of appeals decisions in which the "in the picture" standard was adopted are Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1972), cert. denied, 409 U.S. 948 (1972); Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1117 (4th Cir. 1985); Secretary of Labor v. Daylight Dairy Products, Inc., 779 F.2d 784 (1st Cir. 1985); Donovan v. Simmons Petroleum Corp., 725 F.2d 83 (10th Cir. 1983). Two appellate court cases in which the more rigorous "reckless disregard" standard was adopted are Brock v. Richland Shoe Co., 799 F.2d 80 (3d Cir. 1986), pet. for cert. filed, S.Ct. Docket #86-1520 (March 19, 1987); and, Walton v. United Consumers Club, Inc., 786 F.2d 303 (7th Cir. 1986).

Court for certiorari in a Third Circuit case 2/ that flatly rejects the more lenient "in the picture" standard. Should the Supreme Court grant certiorari and similarly reject the "in the picture" standard, it will be increasingly difficult for us to rely on a three year statute of limitations.

Another problem that we have noted in some of the PMs is the presumption that the Commission almost automatically gets one additional year to file an ADEA action from the date a Letter of Violation is issued. While it is true that, under Commission regulations (29 C.F.R. Part 1626.15(b)), tolling of the statute of limitations starts with the issuance of the LOV, we should not assume that a court will toll the statute of limitations for a full year. In EEOC v. Colgate-Palmolive Co., 586 F. Supp. 1341 (SD N.Y. 1984), the court rejected the Commission's argument that we were entitled to a full year of tolling. The court noted that Section 7(e)(2) provides for tolling when the Commission "is attempting to affect voluntary compliance...." 586 F. Supp. at 1344, quoting 29 U.S.C. Section 626(e)(2) (emphasis added). Therefore, the Court concluded that the statute of limitations is tolled only as long as there are ongoing conciliation efforts. The Court rejected the suggestion that conciliation continued until the Commission sent a letter to the Defendant stating conciliation had failed. It found that conciliation ceased when Colgate failed to respond to the Commission's letter saying conciliation efforts would end unless Colgate met certain conditions, and Colgate did not meet those conditions.

Because of the potential statute of limitations problems we should attempt to file all ADEA actions within two years of the Act of discrimination. We are therefore recommending that you take the following steps to avoid statute of limitations problems.

1. Investigators should be aware of pertinent statutes of limitations under the ADEA and the importance of expeditious, but thorough, investigation.

2. ADEA cases should be promptly investigated in the compliance units and should be given priority in the legal units for preparing litigation recommendations.

3. In the future, all ADEA PMs must clearly identify the earliest date the violation commenced and, where appropriate, the date when the violation(s) ceased (e.g., due to amendment of a collective bargaining agreement or the employee leaving work to take another job).

4. ADEA actions should be filed immediately after the Regional Attorney is notified of Commission approval.

cc: John Schmelzer
Jacquelyn Shelton
Acting Field Managers

2/ Brock v. Richland Shoe Co., supra note 3.

Mr. THOMAS. Mr. Chairman, that memo was written by our general counsel, Charlie Shanor, and I asked him to join us here. First of all let me give the historical background of that issue.

It had been tradition at EEOC before some of the recent willfulness cases, to allow cases to go beyond the 2-year statute of limitation and then allege willfulness and bring the cases in under that basis. We, as Commissioners, have fought that and argued with our own internal people, and have worked to push them to get within the 2-year statute of limitation so that we don't have to argue the willfulness. This has been a matter of concern to me since I've been at the agency.

I've asked Charlie Shanor to join me because his memorandum is a reflection of that concern, and I think he can elaborate on the specifics.

Mr. SHANOR. The specific data concerning the greater than 2-year-old charges in age cases, of course, were submitted to the committee along with the remainder of the statistical data. Roughly a third of the cases were over the 2-year statute of limitations. We are nevertheless quite hopeful that these cases will not be found untimely under the willfulness standard.

The data we submitted to you indicated that one reason for some of these cases being old was simply that the standard for willfulness has changed relatively recently in connection with the Supreme Court decision in *Thurston*. And there is a pending case that will deal with that in the context of statute of limitations, the *Richland Shoe* case.

This was a memo, Senator Melcher, which was expressly designed (before this committee scheduled any action) to deal with what we perceived to be an aspect of an internal management system problem. And this is simply one of a large number of initiatives taken by this Commission prior to the scheduling of this hearing, in order to try to take care of individual problems which this or any other agency might have in the management of its workload. And there's no question that the workload is very large for the number of personnel and for the budget that this Congress has provided for us to handle those problems.

The CHAIRMAN. Well, then Counsel, you're admitting that a number of the cases recently submitted were beyond the 3-year limitation, beyond willful?

Mr. SHANOR. Some cases, but, Senator Melcher, we, in addition to the time frames of 2 and 3 years, receive a time period for tolling during the time when we're conciliating cases. And so in many of those cases because of the conciliation process, we think that our filings will be timely. We hope so.

Our concern was to address the fact that when they come to us in Washington some are late. We were telling the field try to speed up your processing. The Commission has also told the field in a number of other ways, try to speed up, give expedited treatment to these cases because of the statutory framework that surrounds age, but not Title VII cases.

The CHAIRMAN. Well, I think your memo is clear on the face. Your concern that, first of all they're exceeding the 2-year limitation, and secondly exceeding, in many instances, a 3-year limitation. And now you're suggesting that somehow tolling beyond the 3 years is going to help you.

Mr. SHANOR. Well, that's also on the face of my memo, Senator.

The CHAIRMAN. But, Chairman Thomas, only 1 percent of the complaints in Fiscal Year 1986 resulted in any cases anyway.

Mr. THOMAS. Litigation. That's right.

The CHAIRMAN. That's just recommendations for litigation, isn't that true?

Mr. THOMAS. That's recommendation for litigation, but those are totally different from what we resolved in the field.

The CHAIRMAN. Well, what does the 1 percent refer to?

Mr. THOMAS. The 1 percent refers to what we actually—what you say, we actually litigate.

The CHAIRMAN. Which was 156 cases or 159 in Fiscal Year 1986, was it not?

Mr. THOMAS. Our total litigation numbers are—you're talking about age cases specifically?

The CHAIRMAN. Yes.

Mr. THOMAS. I would assume that the 1 percent talks about the cases that are actually charges that are actually filed, 1 percent of the charges filed with EEOC.

Mr. SHANOR. I think that's probably true.

The CHAIRMAN. Well, what are you telling me, Chairman Thomas? Is the 1 percent 156 or not?

What is the 1 percent referring to?

Mr. THOMAS. What document are you referring to, Senator?

The CHAIRMAN. Table A of Equal Employment Opportunity Commission, Office of General Counsel, September 8, 1987.

I read this—I'm asking you how to read it? The number is 165. And it's in a column that leads me to believe that that's recommendations to litigate.

Mr. THOMAS. That's right.

The CHAIRMAN. Now that's recommendations to litigate. How many cases resulted?

Mr. THOMAS. Okay.

That's resulted—the recommendations to litigate in 109 lawsuits actually filed.

The CHAIRMAN. One hundred and nine?

Mr. THOMAS. That's right.

The CHAIRMAN. Now so far in Fiscal Year 1987, how many recommendations to litigate and actual lawsuits have been filed?

Mr. THOMAS. The recommendations thus far in this fiscal year are 82.

The CHAIRMAN. Eighty-two.

Mr. THOMAS. And there's a lag time between the recommendations to litigate, then there's approval by the Commission, and the actual litigation is filed.

The CHAIRMAN. Well, as of September 3, that means that there are about 27 days remaining in the fiscal year, you've had 82 recommendations to litigate and out of what total number of complaints? That's 17,000. So in Fiscal Year 1986 there were 17,000 complaints, I take it, or charges filed?

Mr. THOMAS. That's right.

The **Chairman**. And in Fiscal Year 1987 there were 10,900, rounding it off?

Now there's a little bit of discrepancy here. That says through the third quarter. But looking at what you're got available here as of September 3, there were 82 recommendations to litigate. So what you're telling me is that—Chairman Thomas, you're going to tell me either one thing or the other. Either you've got enough employees or you don't. Now which is it?

Mr. **Thomas**. If you give me the $193 million that I requested I'll have enough.

The **Chairman**. You would have enough. And so you don't have enough to do the job?

Mr. **Thomas**. If I receive the budget request that I submitted to conduct the program in the manner that I think EEOC should be doing, my Fiscal Year 1988 budget request was $193.4 million. That would be adequate to conduct the program in the manner that I think we can conduct it in 1988, or for Fiscal Year 1988.

The **Chairman**. Well, what we have heard in our testimony today is that a complaint filed has very little chance of getting anybody's attention. That's number one. Number two, that a complaint filed and even getting to the point of recommendations to litigate, is minuscule, less than 1 percent as of completed 1986 fiscal year. And looking at it, is going to be about less than .75 percent of complaints filed to even get to the stage of recommendations to litigate for this fiscal year.

Am I to interpret your testimony that the decline in recommendations to litigate, the decline in actual cases, is due to a lack of money?

Mr. **Thomas**. No.

The **Chairman**. Well, which is it then?

Mr. **Thomas**. If I get the $193.4 million that I requested I'll be able to conduct my Fiscal Year 1988 program. That was the argument I made to the Administration. That's the argument I made on the House side and I came out $26 million to the better in the Administration, and $13 on the House side. Now if you don't——

The **Chairman**. Now wait a minute.

You made a request for $193——

Mr. **Thomas**. Point $4 million.

The **Chairman**. And you're saying—what happened in the House?

Mr. **Thomas**. We lost 13 of that.

The **Chairman**. Thirteen. And what were you operating in Fiscal Year 1987?

Mr. **Thomas**. One hundred and sixty-seven.

The **Chairman**. One hundred and sixty-seven.

Mr. **Thomas**. I think—I didn't give you the exact numbers, but its about——

The **Chairman**. That's good enough.

And what were you operating in Fiscal Year 1986?

Mr. **Thomas**. I don't have the budget number. I think it was 158.

But the argument that I made in the Administration was very simple—that we had reached the point of getting the maximum, all we could expect, in gains and efficiency, with about a 5-percent increase in efficiencies. Without the increase, it would not be enough to conduct the litigation program, as well as the compliance program, as well as the automation program that we envision. The Administration's budget was to give us the additional resources, both quantitatively and to allow us to increase our resources qualitatively so that we could handle the program.

Now with respect to the litigation numbers, the success we have in the bulk of the work (the recovery that we do in the age area, as well as in our other areas) comes through compliance. And only the cases that fail conciliation actually are litigated. The recovery for compliance was $54.7 million in fiscal year 1986. That's over half the money that we recovered that year through compliance and litigation.

Now with respect to the drops in recommendations for litigation, it's very interesting. A few years ago I was criticized because we were not pursuing aggressively enough BFOQ cases among firefighters and policemen. Well, when Congress changed the law; it required us to move away from the BFOQ cases, which we did. And we, of course, were moving more into private sector, and we were required to study the BFOQ cases. Of course, the cases that were in our pipeline, were BFOQ cases consistent with what was coming in, and what we saw out there as problems. Now because of that, we have to develop different types of cases in order to make up for the difference.

I also might add that the entire increase in the volume of cases came during my tenure at EEOC; I've seen the low water mark and I've seen the high water mark. I've seen horrible cases, poor quality of cases and I've seen the improvement in the quality of cases. I did not come here to say to you that EEOC is perfect, but I can tell you that it's been on an upward trend and it will continue on an upward trend. And this number of cases recommended for litigation reflects a number of things other than simply resources.

The CHAIRMAN. The testimony of the American Association of Retired Persons this morning was to the effect that $450 million annually in lost pension benefits on post-normal retirement age pension benefit accrual. You just told me, Chairman, that because of the law passed by Congress that the Commission made a decision they had no responsibility to enforce collection of those retirement age pension benefits. That is not the considered opinion of attorneys working for the American Association of Retired Persons.

Mr. THOMAS. First of all, it's kind of interesting. When I initially resurrected these, I was praised by that same organization. I could have left the decision on post-normal accrual as I met it, after the last Administration. There was a letter, even with all of the changes that were made in the law, called the Ellsberg letter in which the Department of Labor interpreted the changes in the ADEA not to require post-normal accrual. I was concerned that that had not been given fair consideration. I think this occurred in 1983 or 1982—I can't remember. And I instructed our staff to go back and look at this again, because of those concerns, and because I couldn't see anything on the face of the statute.

We went through the regulatory process. We had all sorts of debates. We had to do all sorts of economic impact analyses and the whole bit. I appeared before Senator Grassley when Congress was considering passing legislation to require post-normal accrual, and suggested at that time that it would be easier to do that through legislation than it would be through the regulatory process because of the litigation that we could anticipate, because of the differences of opinion, and because there was a major difference of opinion. It is not just that easy. You have a letter that says that sentiment among the individuals who actually drafted the changes in ADEA, but nothing in the facial language of the statute that says it. We made the best cut we could and were going through the process to finalize those regs. When you passed legislation requiring accrual, you also gave us a deadline by which we were to implement it. Because we don't have unlimited resources, we made the decision that we were going to take the people, and it's just a few people, who worked on these regs off those regs and put them on the new regs so we could get those done within the required time frame. And that's simply what we said at the Commission meeting. That's what we said to AARP. They've never come to EEOC for clarification. That's really interesting. But we have made that. There's no secret to that at all. And I find it intriguing that it said that I'm the one who doesn't want this when I'm the one who resurrected it. I could have let it stay where it was when I got to EEOC.

The CHAIRMAN. Well, having started the rulemaking process, you also made the decision to terminate that rulemaking process, did you not?

Mr. THOMAS. That's right. I was the same person.

The CHAIRMAN. And was that made at the advice of counsel?

Mr. THOMAS. Terminating the rulemaking process?

The CHAIRMAN. Yes.

Mr. THOMAS. It was made at the advice of our legal counsel, as I remember it. That's been awhile back. But we do nothing without the input of—if it's a litigation, our general counsel, if it's a regulatory process internal, without the input of our legal attorneys, our legal counsel.

The CHAIRMAN. I think the question of whether or not given the set of circumstances that exist right now, the determination of whether or not post-normal retirement age pension benefit accrual is to occur prior to January 1, 1988, perhaps is going to have to be made by Congress, but because you have effectively mooted this action by rulemaking.

Now what the reason for avoiding some of the issues that have been raised by witnesses today? For instance, our first witness was Mr. Lusardi, who's involved with a class action suit against Xerox, involving, we're told, 1,300 employees? This was a matter before the Commission, was it not?

Mr. THOMAS. Was Mr. Lusardi's case before the Commission?

The CHAIRMAN. No. The whole question of Xerox was before the Commission, was it not?

Mr. THOMAS. Yes.

Well, Mr. Chairman, let me in all due respect indicate that that was in a closed session of our meeting. And that the discussions of those cases in the closed sessions are privileged. It is something that we have indicated to staff that we'd be more than willing to discuss. But what this does for us is that once we begin vitating that closed session, those sessions become discoverable in litigation against employers. And there are many employers who have tried to discover the contents of those closed sessions.

Now with that in mind, I will try to respond to your question. We did consider that particlar case and the issue did not have to do with the merits of Mr. Lusardi's case. As I remember it was a pre-March or January 1983 case. But rather the actions that took place subsequent to 1983, those are a different set of facts and a different group of individuals. Those were our concerns. And it was our judgment that what we had was insufficient. It was a factual judgment, not a legal judgment in the sense that we didn't think that if the facts were as we saw them, there would have been a violation. We just didn't see the facts there subsequent to 1983.

The CHAIRMAN. Well, first of all as to the——

Mr. THOMAS. That's just my opinion. I didn't ask the other Commissioners, I'm sorry.

The CHAIRMAN. First of all, whatever your interpretation of the statute is regarding closed meetings I think that under the Sunshine Act Section L specifically specifies that this statute does not constitute authority to withhold any information from Congress.

Mr. THOMAS. Well, we did not suggest, Mr. Chairman, withholding information from Congress. We suggested that we not make the information public. And we indicated to the staff that we would be more than willing to dicuss it with the staff, as well as with the Senator, but we have to avoid making the contents of those meetings public. And in fact, we did give the full file to the staff. So we did not withhold it from Congress.

The CHAIRMAN. Well, then you can tell me why you made your decision on the Xerox case.

Mr. THOMAS. The facts were subsequent to Fiscal Year 1983. Each of these cases—we consider over 700 cases a year—we go through each one in detail, and we have to look at each thoroughly. We had just come off, it's very interesting to note, another case in which we were castigated without facts, we had many problems and in which we spent $15 million and the respondent spent $25 million and we came up empty. We have to make the judgment, particularly in large major class actions, whether this particular case is one that we can win or whether it is one that we should pursue. We could not pursue every single major class action that comes along. We don't have the litigation budget to do that.

This case, however, was not a resource question. It was simply one of facts. And it was a considered judgment of each of the Commissioners; each of us was briefed, each of us considered the case seriously, and each one of us cast our votes, which we do over 700 times a year.

The CHAIRMAN. Now in March of this year the Commission voted on the Xerox question, and apparently voted to disapprove the general counsel's recommendation for litigation.

Mr. THOMAS. That's right.

The CHAIRMAN. So while you consult with counsel, as you stated in response to an earlier question, the Commission chose in this instance to disregard the recommendation for litigation, is that correct?

Mr. THOMAS. We do that routinely. It's a matter of fact that about 85 percent of the cases, or maybe 90 percent of the cases that the general counsel recommends for litigation we approve. We do not approve everything we're not rubber stamps. We review every single case, whether a small case, a class action, or a major class action, pattern and practice case. We go through every single file. Just because the general counsel recommends it, doesn't mean we have to approve it.

The CHAIRMAN. And except in 85 percent of the cases are you just telling me that you do?

Mr. THOMAS. About 85 percent of the cases we approve.

The CHAIRMAN. General counsel make a recommendation to approve it——

Mr. THOMAS. The process is——

The CHAIRMAN. So this is one of the 15 percent?

Mr. THOMAS. That's right.

The CHAIRMAN. And this is one that involves, is it fair to say 1,300 people?

Mr. THOMAS. I don't know whether the class was that large. As I remember it there were between 40 and 50 people that were identified.

The CHAIRMAN. I think the testimony we received today was that it was 1,300 involved.

Mr. THOMAS. You can look at the facts. As I remember it was——

Mr. SHANOR. That's a currently pending case. Whether that was the same case, I don't know.

Mr. THOMAS. The Fiscal Year 1983 case is a different case.

The CHAIRMAN. A different case?

Mr. THOMAS. Yes, that's pre-1983.

The CHAIRMAN. That's pre-1983.

Mrs. SILBERMAN. Forty-eight individuals were identified at the time of recommendation.

The CHAIRMAN. Pardon me?

Mr. THOMAS. Forty-eight is subsequent to 1983.

There are two different time periods that we're talking about.

The CHAIRMAN. Well, what you're talking about is 48?

Mr. THOMAS. That's right.

The CHAIRMAN. Prior to 1983——

Mr. THOMAS. Subsequent to 1983. You're looking at two different time periods. The case that's in court now, is pre-January 1983. We were looking at post-January 1983.

The CHAIRMAN. Well, what did you decide pre-1983?

Mr. THOMAS. We didn't decide anything. That was being litigated.

The CHAIRMAN. That's being litigated.

Mr. THOMAS. What happens normally in private counsel, and particularly in the age cases, is there are a lot of competent private counsel, particularly in the large class actions. We make decisions, often times, to intervene in some of these cases where we think that we could either assist in providing expert witness of expertise that they don't have. When you have competent counsel, we make the decision not to intervene because of the resource question, and because we can't add anything.

Now in the appellate cases we routinely file a brief or participate in appeals. But where there is competent counsel we don't intervene. Those are two separate issues. I think this case is being competently litigated, and there was no question about it. So what we're talking about is beyond the scope of this litigation.

The **Chairman**. Am I to assume that the 48 people involved subsequent to 1983, and you're testifying there are 1,300 prior to 1983, I guess is what you're testifying. Is that correct?

Mr. **Thomas**. That was the testimony of another witness, the 1,300.

Mr. **Shanor**. We have no way of verifying or corroborating.

Mr. **Thomas**. All I can testify to is that the numbers involved in the case that we considered were 48 individuals.

The **Chairman**. And when did that case arise? When did that complaint arise?

Mr. **Thomas**. The facts involving that case were subsequent to January 1983.

The **Chairman**. Subsequent to January 1983.

Mr. **Thomas**. That's right.

The **Chairman**. And when was the complaint filed?

Mr. **Thomas**. February 1984.

The **Chairman**. February 1984. Now are you telling me, Chairman, that that's different than those people that were laid off by Xerox prior to January 1, 1984?

Mr. **Thomas**. We looked at the facts subsequent to the period involved in the lawsuit. The information that we looked at involved whatever processes, whatever procedures were in place during the time period of the charge that we were considering. And what we considered at that time was different from what was in the lawsuit. That's all I can tell you.

If we had had exactly what was in the lawsuit before us as a Commission, there could have been a different result. All I can say is that we considered what we had before at the time in making our judgment.

The **Chairman**. Well, I'm reading from the letter of violation issued by the Commission, dated April 19, 1984, that the Commission has determined that Xerox has discriminated against the individuals named and yet to be named in the employment policies and practices which discriminated against salaried employees within the protected age group of 40 to 70.

Now this is a letter of violation dated April 19 and at some point after April 19, you made a determination that there was no violation. Was that this year you made that determination?

Mr. **Thomas**. Well, let's go back a second. Letters of violations and letters of decisions, LOV's, LOD's, as we call them, are issued at the staff level. That's a determination in our administrative process by one of our officials that they believe that discrimination did exist. The Commission itself makes a separate decision whether we have enough to litigate. Every recommendation for litigation contains some sort of decision that there was discrimination. And we routinely go through every single one as a Commission without delegating the authority to authorize litigation and make a separate decision as to what should be litigated.

The **Chairman**. Now a Commission's memorandum, dated April 16, 1984, 3 days prior to this letter of violation, refers to the *Lusardi* v. *Xerox* case.

Mr. Thomas. Yes.

The Chairman. So whatever you've been telling me about 48 people subsequent to 1983, meaning in early 1984, as being different than the *Lusardi* case seems not to be the case at all, Mr. Chairman. It seems to be that that is the *Lusardi* case.

Mr. Thomas. In each of the communications from the general counsel it was made clear that the scope of this case was to be different from that particular case. It says very clearly that the claims are outside the period covered by that suit.

The Chairman. The point is, Mr. Chairman, that initially the Commission relied on the *Lusardi* case for your own case.

Mr. Thomas. We take it into consideration as we do everything that's relevant.

The Chairman. And the *Lusardi* case is based on an individual who was 41 years of age being discharged.

Mr. Thomas. Senator, if we had the facts of the *Lusardi* case we would have probably litigated it, more than likely. I can't vote for the other Commissioners. We did not have those facts.

The Chairman. The attorneys working with Lusardi gave you everything they had. What more can they do?

Mr. Thomas. It's for a different time period, Senator.

The Chairman. A different time period.

Mr. Thomas. It's a different case.

The Chairman. Nevertheless, it's the same company and the same issue and you are telling me that it's different.

Mr. Thomas. Senator, we have to consider the facts in any case that we have before us. We spent $15 million of the taxpayers money and $25 million of an employer's money using that kind of theory—that they did it before so they must be doing it now.

The Chairman. Is it your opinion that this is just a question of management decision?

Mr. Thomas. The *Lusardi* case? This particular case, Senator?

The Chairman. Any—they're all similar.

Mr. Thomas. This case consideration—each one of these cases, we introduced the practice of going through the files of each case. That didn't pre-date us. We introduced the practice of considering evey single cause finding that came in the field, every single recommendation for litigation. These things weren't done before. They were disposed of at the staff level. We cleaned all that mess out. It's not a management decision. It was our concerted effort to review every single cause finding to determine whether our Commission should litigate. We have exercised our responsibilities in our best judgment. We didn't do it on a whim. We didn't do it under pressure. We read all the cases. We considered all the facts. We debated it. We thought about it. We were briefed on it, and we made our decision.

It was a tough decision, like some of the others are very tough decisions. There are very few routine decisions.

The Chairman. Well it's true that if in the *Lusardi* case representing the 1,300 employees, if they should win, wouldn't that set the tone for the court in the 48-person case that you've been referring to?

Mr. Thomas. I think the court would have to look at the facts, Senator. We have cases that up to a certain time period you do have people who recover, and beyond that period they don't. The facts of this particular case govern. I don't think it can fall in the shadow of a previous case. That would be relevant, but it certainly would not be dispositive.

The CHAIRMAN. The question of determining whether or not there was coercion involved was a matter the Commission considered before you decided not to go any further with the *Xerox* case, is that not true?

Mr. THOMAS. I think it was a matter that was before us, yes. It was a matter that was discussed in this particular case.

The CHAIRMAN. And having made the decision not to go through with the case, can you tell this committee why Xerox knew before the Commission made their announcement?

Mr. THOMAS. Knew what?

The CHAIRMAN. Knew that the Commission was going to rule that there was not going to be any pursuit of the case?

Mr. THOMAS. I don't know. Maybe they had some discussions with our staff. I was informed several weeks before we looked at this case that this case was still on the agenda, by someone from Xerox, and I did not know it was still on the agenda, and just asked about it. And we were all briefed, I think, a month or two later. But that was prior to any recommendations for litigation. There were no subsequent contacts by any of the Commissioners that I know of with any member of Xerox, including myself.

So my guess as to how they would know or what knowledge that they would have had is that they would either have gotten it from some contacts with our staff or just guessed it.

The CHAIRMAN. Are you aware that they did know?

Mr. THOMAS. No. This is the first I've heard of it.

The CHAIRMAN. And when did the Commission make their decision?

Mr. THOMAS. The decision was not made until the date of the vote.

The CHAIRMAN. What date was that?

Mr. THOMAS. It was a notation vote.

The CHAIRMAN. What date was that?

Mr. THOMAS. We're checking that, Senator. I don't think we have it here, but that vote—I don't think that was communicated to anyone, to my knowledge, unless it came from our staff. I think that we had a briefing at a Commission meeting, and the staff pretty much knew after that Commission meeting that the vote was going against recommendation. But the vote closed on March 26.

The CHAIRMAN. Of what year?

Mr. THOMAS. Of 1987. We were briefed on March 16, and at that time I think it was fairly clear.

The CHAIRMAN. March 16 of what year?

Mr. THOMAS. It was 1987.

The CHAIRMAN. Of 1987. Then you're not aware of the Xerox Corporation 1985 annual report that states in 1984 the company received a letter from the Equal Employment Opportunity Commission alleging that the Commission determined that the company had violated the Act. And goes on to state, that the company has been informally advised that the EEOC has terminated its proceedings in this matter, and this is the 1985 annual report which I suppose——

Mr. THOMAS. I wouldn't have the slightest idea.

The CHAIRMAN. The report was issued a whole year ahead of the time that you made your vote.

Mr. THOMAS. I wouldn't—the only portion of this that I think we would have communicated to them is that we were not going to be involved in the 1983 action, but I think that there is some indication in the memos here that that occurred. Now, we discussed with our attorneys—I believe in early 1984 or 1983, I can't remember when—this particular action and we limited our investigation—we didn't duplicate the 1983 action. We just went with the subsequent action. But that action was alive and well during this entire period. I don't have the slightest idea how they could come to the conclusion that we had terminated a matter that had not been terminated.

And it's my understanding also that conciliations were still in process during this period. In fact I was not even aware that we were continuing this until we got the subsequent briefings. I was not involved. And the reason for the time period from our staff as to why it took so long for us to get it upstairs to vote on it was because of the ongoing conciliation, and the concerns about the information we were getting from Xerox.

The CHAIRMAN. Now, regardless of how they knew a year ahead of time that the case was going to be dropped, Xerox accomplished the reduction in its work force through terminations as well as through voluntary retirement. There was evidence presented by your own staff to show that some of the 3,000 workers age 40 and older were coerced or forced into voluntary retirement. Is that not true?

Mr. THOMAS. I don't remember those facts in the material that was presented to us.

The CHAIRMAN. Are you telling me that your own staff did not present evidence to show that some of the 3,000 workers aged 40 and older were coerced or forced into voluntary retirement?

Mr. THOMAS. In the case that they presented to us, we questioned that characterization and the answer is as to whether they presented any evidence, the answer is no.

The CHAIRMAN. Now wait a minute.

I want you to think carefully about this, because the Office of General Counsel in a memorandum dated March 24, 1987, the—I'm quoting, "We agree with Systemic that there is sufficient evidence to allege that many of those who allegedly retired voluntarily did so only because they felt they had no choice."

Mr. THOMAS. They provided no evidence. There was no evidence. That's an assertion. That's a conclusion. And the purpose of our debates, deliberations, discussions——

The CHAIRMAN. My question was, Mr. Chairman, whether—my statement was to the effect that there was evidence presented by your staff that some of those who voluntarily retired were coerced.

Mr. THOMAS. Senator, the response that I'm giving you is that that's an assertion. The questions that——

The CHAIRMAN. That's an assertion?

Mr. **Thomas**. That's an assertion, and the question we asked is what—tell us what happened, to whom, when. We sent them back after our briefing to get that kind of information so that we could have a case to go to court. With that kind of information we can go to court. The mere assertion is not enough in litigation.

This is what we routinely go through in our cases that are presented to us. Give us the facts. We know what the assertions are. That's what the debate is about. And then the question is, whether or not those facts would constitute a violation.

The **Chairman**. Chairman Thomas, this memorandum is dated March 24. You just said that you sent them back.

Mr. **Thomas**. We sent them back. The briefing was March 16.

The **Chairman**. This memorandum is March 24.

Mr. **Thomas**. The briefing was March 16. We were briefed on these, both individually and at the Commission meeting. The questions that we raised were: we see the assertions, what are the facts.

The **Chairman**. All right.

You raised that on March 16, and they come back with this memorandum March 24.

Mr. **Thomas**. With the assertion repeated.

The **Chairman**. With the assertion repeated.

Mr. **Thomas**. That's right. With no evidence.

See that's the problem. Okay? We can't go to court with just the assertion.

The **Chairman**. Well then isn't my statement correct that they presented evidence or what they thought was evidence to the Commission that there had been coercion in some of these voluntary retirements. They think this is evidence.

Mr. **Thomas**. The assertion?

The **Chairman**. They think this memorandum is evidence.

Mr. **Thomas**. That can't be introduced as evidence. They've got to show something to the judge.

Mr. **Shanor**. Your Honor—I mean, Senator Melcher, I was not general counsel at the time, but I would have to agree that that is simply an assertion on the face of the memorandum. And the Commission, since it makes the litigation decisions, is entirely within its parameters, within its authority to ask for those facts. I, of course, was not there at the time that the questions were asked or that the answers were given or not given.

Mrs. **Silberman**. Senator, if I may just comment on that.

This was one of the reasons why when Chairman Thomas took over the Commission and when the rest of us came on—and we should probably introduce Commissioner Evan Kemp who's in the back of the room, our newest Commissioner—that we determined that it was necessary that we see these files, that we not take two and three page memoranda with characterizations, but that we look to what evidence backed these things up so that we would not get into another sitution like—I guess I can't mention the name of the $40 million case, because it's still on appeal, but we couldn't do it any longer. We had to go to court with evidence and this is a perfect example of a situation where we didn't have it and we were being asked to. And when we sent them back to get it, all we got were assertions.

The **Chairman**. I make this entire memorandum, as well as the letter of violation and the other documents we referred to as part of the record at this point. But I'm only reading to you small excerpts from this memorandum, plus the attachment which gives the original complaint.

Now the conclusion, the concluding paragraph that appears on page 129 says that, "based on the evidence that Xerox developed and implemented a deliberate corporate policy, which resulted in a pattern of willful violation of the Age Discrimination in Employment Act and upon the unwillingness of Xerox to conciliate within the requirements of the Act, we recommend that the Commission approve the filing of the attached complaint."

Now that is attached here. I'm not reading the entire memorandum. I'm only pointing out that on this date, subsequent to that March 16 briefing that you referred to, Chairman Thomas, that on this date, March 24, 1987, you've got a memorandum from your own staff, that says there is evidence of this infraction of the law. Now, that being the case, I don't see why you're ducking the point. You may answer, if you so choose, that you did not believe the evidence was sufficient, but certainly this memorandum from your staff shows that there is evidence and that was the point of my statement. I just wanted your agreement on it, that you were presented that memorandum.

[The memorandum and accompanying documents follow:]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 23, 1987

MEMORANDUM

TO: William Ng
Deputy General Counsel

FROM: James N. Finney
Associate General Counsel

SUBJECT: EEOC v. Xerox Presentation Memorandum

This revised PM is attached, and submitted for review and forwarding to the Commissioners. Since briefing the Commissioners on this matter we have reviewed our notes of their comments, and have received several calls from special assistants with questions or clarifications on several points. We have tried to incorporate information, discussion and analysis to address the questions and concerns we received. Cases on several issues were suggested for review and that was done.

There are three possible courses of action. The Commission might view the findings as supporting an action in the nature of a pattern and practice case, either on the theory of disparate treatment, or on the theory of disparate impact. Secondly, the Commission might decide that the record only supports a consolidated action based on individual claims. Finally, the Commission might determine that the facts do not warrant further action.

Since Commission policy in the area of workforce reductions or early retirement programs is unclear or unsettled, we believe that it is appropriate that have the clearest opportunity to review and consider the several options presented. Any action taken can be prematurely interpreted--or, misinterpreted--as a reflection of Commission policy. Traditionally, the Commission has been careful to avoid creating confusion as to policy in unsettled, and sensitive areas before it has had an opportunity to formulate its views.

We would hope for some guidance as to how this matter might be resolved. It should be noted that some of our complainants will be affected by the statute of limitations after the end of this month.

Attachment

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

MAR 24 1987

MEMORANDUM

TO : Clarence Thomas, Chairman
R. Gaull Silberman, Vice Chairman
Tony E. Gallegos, Commssioner
Fred W. Alvarez, Commissioner

FROM : William H. Ng
Deputy General Counsel

SUBJECT : Litigation Recommendation --
Xerox Corporation

For the following reasons, the Office of General Counsel concurs in the recommendation of Systemic Litigation Services which we received on March 23, 1987 to litigate this ADEA case. The proposed complaint alleges that Xerox Corporation discriminated against salaried employees and former employees between the ages of 40 and 70 by "selecting [them] for termination and forced early retirement based on their age." This case is presented for expedited consideration because the three-year statute of limitations, including one year of tolling for conciliation, will expire for some individuals affected by the challenged practice on April 1, 1987.

Initially, we point out that this case does not involve a typical reduction in force situation in which a company has decided to decrease its overall workforce. In the present case, there is substantial evidence that, at the same time Xerox was targeting its older, higher paid workers for termination, it was hiring younger, lower paid workers into similar, if not identical, positions. Xerox was not decreasing its workforce. Instead it appears that the company undertook a deliberate program to save money by decreasing the number of higher paid, older workers and increasing the number of lower paid, younger workers.

Furthermore, we agree with Systemic that there is sufficient evidence to allege that many of those who allegedly retired voluntarily did so only because they felt they had no choice. The company admits that its voluntary reduction-in-force program specifically focused on those whom it believed should be terminated if they did not voluntarily retire. In addition, there is direct and statistical evidence that Xerox targeted its older, more highly paid workers, for the voluntary retirement program. It also appears from the Presentation Memorandum that many of those with whom the voluntary retirement program was discussed believed that if they did not retire they would be terminated.

Of course, this evidence does not indicate that all those who accepted Xerox's offer to retire early were coerced into doing so. Under normal circumstances, we would recommend delaying a decision on the breadth of this suit until we learned more about which individuals were in fact involuntarily retired. However, Xerox refused to provide the information necessary to determine which individuals should be included in our claims for relief. The company also has refused to toll the statute of limitations for any individuals other than the 48 individuals already identified in the investigation. If we do not file suit on behalf of all potentially aggrieved individuals before April 1, 1987, at least some of these individuals may be denied relief. Therefore, we recommend that suit be filed on behalf of all persons "forced" to retire with the understanding that we will not seek relief for any individuals whose retirement was truly voluntary.

It is to be expected that Xerox will attempt to defend against a suit by arguing that its policy was justified by cost considerations. In our view, whatever validity a cost defense may have under other circumstances, such a defense cannot be accepted in this case because it would serve as a justification for a policy of removing higher paid, older workers and replacing them with lower paid, younger workers.

For these reasons, we recommend litigation on the following issues:

(1) Termination and coerced retirement of individuals named in the draft complaint based on age; and

(2) Termination and coerced retirement of similarly situated individuals based on age.

If you have any questions, please contact me at 634-6700.*/

pc: James Troy
Director, OPO

James Finney
Associate GC, GC-S

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*/ The Commission was briefed on this case at the meeting of March 16, 1987.

PRESENTATION MEMORANDUM

Direct Suit

I. Introductory Information

A. Parties:

1. Defendant: Xerox Corporation

2. Plaintiff: EEOC, on behalf of a class of former Xerox employees

B. Commission Charges: Pursuant to the procedures set out in Section 7(b) of the ADEA, the Commission issued a Letter of Violation to Xerox on April 19, 1984. Three prospective plaintiffs in this proposed lawsuit have filed charges alleging class-wide age discrimination.

C. Location of Facilities: Xerox is incorporated in New York. It is headquartered in Stamford, Connecticut and has facilities nationwide. Most of the employees covered in this suit worked in facilities in New York state, California, and Texas. The lawsuit would be filed in the Southern District of New York.

D. Size of Work Force: The number of salaried employees in Xerox and its subsidiaries is about 56,000. The Commission's suit would be limited to former salaried employees.

E. Nature of the Proposed Suit: The Commission's proposed complaint alleges that the Xerox Corporation wilfully and deliberately discriminated against a class of salaried employees aged from 40 to 70 by targetting them for termination, on the basis of their age, and accomplishing the termination through the threat or operation of reductions in force, while simultaneously hiring and retaining younger persons to perform the same work. The suit would be limited to those who were terminated between April 1, 1983 and the date of the filing of the lawsuit. Included in that group are sales workers, engineers, administrators, financial analysts and marketing representatives.

The relief sought by the Commission on behalf of these illegally terminated employees would include reinstatement where appropriate, back pay, adjustment of pension benefits and any necessary adjustment of health or life insurance benefits.

II. Nature of Defendant's Business

The Xerox Corporation is a major nationwide company whose business includes the manufacture, research and sales of computers, reproduction and business information systems, facsimile communications products, office products, and other related activities. Xerox subsidiaries include Ginn Publishing, Western Union, and Versatec Systems. Xerox facilities are concentrated in the northeast, particularly in upper New York state; around Dallas, Texas, and in California. Personnel policy decision-making, systems, and records are centralized in the corporate headquarters in Stamford, Connecticut.

III. Administrative Record

A. Summary Case Processing Chronology

1. Dates Charges Filed: A Letter of Directed Investigation was issued on February 7, 1984. Individual charges alleging class-wide age discrimination were filed by three persons who are prospective class members in the lawsuit.

2. Dates of Determinations: no determinations have been made by the Commission on individual charges. A Letter of Violation on the Directed Investigation was issued on April 19, 1984.

B. Administrative Record--Narrative

1. Direct Investigation by headquarters Systemic Programs was begun on February 7, 1984.

2. Based on the pattern of violation found during its nationwide investigation, the Commission issued a Letter of Violation on April 19, 1984 that commenced conciliation pursuant to Section 7(b) of the ADEA (Attachment F).

3. Conciliation efforts have continued since the LOV was issued. During the entire investigation and conciliation Xerox has been uncooperative in supplying requested data (Correspondence reflecting this is available for review.). Xerox has consistently maintained that its actions were not discriminatory and has refused to discuss its voluntary Reduction in Force programs during conciliation. Xerox has declined to consider any broad based settlement and relief to resolve the violations of the ADEA alleged in the LOV.

The Commission has fulfilled the standards to be met in conciliation: An independent investigation of the alleged discrimination was conducted, Xerox has been presented with a summary of the evidence of age discrimination, and the Commission repeatedly attempted to discuss with Xerox means available to achieve voluntary compliance. Five formal conciliation meetings were held, in addition to correspondence and telephone conferences.

As provided by the Act, the statute was tolled for a year while the Commission conciliated.

As required during conciliation, Xerox was informed that the terminated employees can seek back pay, of the ways in which it could achieve voluntary compliance, and of the possibility that the Commission would proceed to litigation should conciliation fail. In addition, Xerox was invited to express its views of the allegations of discrimination and the EEOC has carefully listened to and considered its presentations.

Xerox consistently maintained that it would conciliate only on the basis of some individual complaints and would not address any of its overall policies. See Xerox's letter to the Commission dated July 23, 1986, appended hereto as Attachment G.

After our last meeting, on January 14, 1987, the Commission gave formal notice to Xerox that conciliation would fail. During the meeting, and in the EEOC's letter of February 5, 1987 (attachment A) we outlined our findings and informed Xerox that, in light of our evidence, the inquiry and potential relief cannot be reduced to a few isolated individual persons.

Xerox has refused our offer to continue conciliation discussions in return for its agreement to a general tolling of the statute. See Attachment H.

IV. Scope of Proposed Suit

The proposed suit would challenge Xerox's practice of terminating individuals protected under the ADEA, while hiring younger persons to perform the same functions. The suit would either be filed on behalf of a class of employees who were terminated from Xerox after March 31, 1983, who were over 40 years of age at their terminations, or on behalf of the individuals in this class who have been specifically identified as of this date as having been affected by this policy, forty-eight of which have been interviewed to date. These identified individuals attempted to opt into private ADEA litigation now pending against Xerox (see infra). These individuals' claims were outside the time period covered by that suit and they consequently sought the Commission's assistance in pressing their claims of discrimination. From the information available, it appears that there are approximately 150 additional identifiable class members. The suit would involve three Xerox divisions which have been most heavily implicated in the involuntary terminations of older workers. Most of this group of 48 known class members were in professional positions such as engineer or were sales representatives. As noted above, the relief sought for this group includes back pay, reinstatement, and adjustment of retirement benefits.

The geographical scope of the proposed suit is nationwide, although its focus would be in New York, California and Texas. Xerox maintains, in its Connecticut headquarters, a centralized computerized personnel data system containing records for all employees nationwide. During the investigation, the EEOC developed and organized a computerized data base from Xerox records which would be suitable for use during litigation, although updating would be necessary.

The Commission's investigation has not found direct evidence of age discrimination in promotions or in hiring. Though evidence indicates that Xerox seldom hires persons over 40, no charge has been made by any unsuccessful applicant that alleges age discrimination. However, Xerox has an announced policy of "redeployment" and retraining of workers in discontinued jobs to new positions; members of the class covered in this action allege that there were open jobs to which they could have been transferred instead of being terminated. The proposed suit would use this evidence of failure to redeploy as evidence of discriminatory motive in effecting the terminations of older workers.

Our investigation has not uncovered any evidence of a pattern of discrimination on the basis of race, national origin, or sex. There have been some charges making those allegations, but upon review the allegations were found to reflect an individual incident or to be insufficient to support a cause determination.

V. Other Related Actions

Lusardi v. Xerox, (D.N.J.) a class action suit alleging company wide age discrimination by Xerox, was filed March 8, 1983. The original Lusardi plaintiffs were sales representatives who were terminated after long and successful careers with Xerox. They filed charges of discrimination with the EEOC when they learned that they had been replaced by younger new hires. The court has established a cut-off date, so that those eligible to opt-in as plaintiffs in that suit are those whose cause of action arose on or before March 31, 1983. Over 1300 plaintiffs have opted into this lawsuit which alleges across the board age discrimination against all present and former employees aged 40 to 70.

Evidence submitted in plaintiff Lusardi's Cross-Motion for Summary Judgment supports allegations by the plaintiffs that Xerox, beginning in late 1981, designed and implemented a massive program to get rid of older, higher paid employees and replace them with lower paid new hires in an effort to cut costs. This motion is pending.

Also pending is Xerox's motion to decertify the class of plaintiffs. Xerox has filed and lost five appeals in the Third Circuit already regarding procedural aspects of filing and maintaining such a suit as a class action.

VI. PROOF OF ISSUES FOR SUIT

The law in the Second Circuit, where this lawsuit would be filed, is that policies to limit higher-paid, longer tenure employees are violative of the ADEA when these policies disproportionately impact on workers protected under the Act. Geller v. Markham, 24 FEP Cases 920, 925 (1980). The statistical evidence developed in this investigation clearly demonstrates that Xerox undertook efforts to rid itself of older, relatively higher paid workers and replace them with young workers. This policy resulted in workers over 40 being earmarked for termination, and terminated, in proportions far exceeding their presence in the workforce, while the work they performed was given to new, younger hires, thus resulting in violations of the ADEA. See also Tribble v. Westinghouse Electric Corp., 669 F.2d 1193 (8th Cir. 1982); Marshall v. Arlene Knitwear, Inc., 454 F.Supp. 715 (E.D.N.Y. 1978).

The evidence also shows that official company policy was to insulate newly hired college recruits from layoff. This is itself a violation of the ADEA, and further evidence that the reductions-in-force of older workers were motivated by impermissable considerations of age. See Williams v. General Motors Corp., 26 FEP Cases 1381, 1388 (5th Cir. 1981). These facts and the law as articulated in the above cases and by the Supreme Court in sanctioning the use of Title VII's proof structures in ADEA cases, Lorillard v. Pons, 434 U.S. 575, 584 (1978), form the central theory of this proposed lawsuit. The facts will be discussed in detail below.

At the outset, however, some discussion of the means by which the RIF's of older workers were accomplished is in order. There were two types of RIF's--"voluntary" and involuntary. Regardless of the type, individuals received the same severance pay, based on tenure. However, individuals who were voluntarily riffed also received outplacement assistance. Individuals were usually notified that they were vulnerable to the involuntary RIF, and then offered outplacement should they take the voluntary RIF. Further, individuals targetted for involuntary RIF could, if they were 51.5 years old or older, take the voluntary RIF and in addition to outplacement, avail themselves of the opportunity to amortize their severance pay over 30 months and then hold that money in the plan for another year in order to make them eligible for a pension payment that they had accrued interest in, but had not vested in (Xerox had ten-year cliff vesting). However, this pension payment would be calculated at the reduced annual fictional "salary" computed from the yearly amortization of the severance pay, thus resulting in substantially lower pension payments than the individual would have received had he continued working, even to age 55, let alone to the "normal" retirement age of 65. Similarly, for those who had already vested in the pension plan, the amortization of salary would result in severely lowered pension payments.

This program, called Bridge to Retirement, required the individual to allow Xerox to retain his contributions in the pension plan, without itself making company contributions, until the employee reached 55, in order to receive the reduced benefit. An example of the operation of the Bridge to Retirement Plan for a vested employee follows:

Sample Employee: 51 years, 7 months old, with 13 years service, at a Salary of $48,000 annually. Planned to retire at 65.

	BTR Benefits	Continued Work Benefits
1.	15 months salary amortized over 30 months; funds held until employee reaches 55: $60,000 paid to employee and 1/2 normal contributions made, only until employee is 54.	$48,000 a year until age 55 ($179,000 including raises) Pension funds augmented by employer contributions at full salary amount for entire period.
2.	Begins drawing $600/month pension at 55 (draws $72,000 to age 65).	Earns approximately $500,000 to age 65. Xerox contributes fully to pension account.
3.	Age 65: continues to draw reduced benefit of $600 per month.	Begins drawing pension benefits of approximately $1800 per month at 65.

Individuals who availed themselves of the Bridge to Retirement plan stated they did so only because they had been informed that they would be involuntarily riffed if they did not, and the program enabled them to receive something from their years of contributing to the pension plan. We believe this plan entailed no "sweetening" of retirement benefits; rather, it caused employees to accept substantially smaller benefits than they would have received had they been allowed to continue working even a year or two more, which option employees chose in lieu of receiving no benefits. Given this, and the testimony of employees that they were made to understand they could take this program or leave with nothing (not even outplacement services), the voluntariness of the election is highly questionable. Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. 1982) (employee's election of early retirement when he has been told that he was in danger of being discharged and that he would lose his stock benefits if discharged cannot be considered as voluntary act; a reasonable person would have felt compelled to take early retirement and therefore the retirement was involuntary); Velasquez v. City of Colorado Springs, 23 FEP Cases 621 (D.Colo. 1981) (an employee who resigns after being informed that if he does not some means will be found to fire him has not acted voluntarily).

Finally, that Xerox may claim that its actions were motivated by economic need does not insulate these actions from ADEA liability:

> Where economic savings and expectation of longer future service are directly related to the employee's age, it is a violation of the ADEA to discharge the employee for those reasons.

Geller v. Markham, supra (citations omitted). See also Laugeson v. Anaconda Co., 10 FEP Cases 571, 574 (6th Cir. 1975); EEOC v. Sandia Corp., 23 FEP Cases 799 (10th Cir. 1980).

Evidence of Companywide Pattern of Age Discrimination

Evidence concerning possible age discrimination by Xerox has been gathered from many sources, including interviews with charging parties, potential plaintiffs, and plaintiffs in the Lusardi lawsuit; statistical analyses prepared by an outside expert, information submitted by Xerox, and information from the record in Lusardi.

Although the period covered in the proposed suit begins April 1, 1983, the employment policies of Xerox and the specific circumstances of the terminations of this group of prospective plaintiffs should be examined within the context of the actions of Xerox taken between 1980 and March 31, 1983. It is clear that these actions are directly related to the discrimination which continued throughout the period at issue here. Consequently, some of the evidence discussed is from this earlier period. The actions challenged in this suit began when, as the Xerox Corporation explained, it undertook extensive restructuring and organizational changes in order to become more competitive in the high technology industry. The evidence obtained by the Commission shows that Xerox embarked on a conscious and deliberate program of eliminating older, higher paid employees and by replacing them with younger new hires. Xerox accomplished this end through involuntary reductions in force (IRIF) and through coercing older employees to accept what it termed "voluntary" programs (VRIF). The company not only saved money in salaries but also was able to reduce its costs in contributions to employees' retirement accounts, as those contributions are computed as a percentage of employee salaries.

This program to replace older workers with new hires was most intense in 1981 and 1982. The filing of the Lusardi lawsuit in March, 1983 corresponds with a sudden drop in the number of forced early retirements, but the terminations of older workers continued through 1983 and into 1984.

It appears that Xerox is presently reactivating its effort to eliminate older workers. On October 16, 1986, Xerox announced that it plans to reduce its professional workforce by offering early retirement benefits to 4000 of its senior employees. The newspaper account (Attachment B) quotes Xerox officials as stating that lay-offs will be necessary if too few older workers take advantage of this offer. We do not know the exact details of the proposed "early retirement" benefits being now offerred.

There is extensive evidence, both anecdotal and documentary, that the elimination of older workers from the Xerox workforce was a corporate policy. Memoranda circulated at the highest levels of Xerox corporate management state that its "maturing, aging workforce" is a hindrance and a "constraint." Examination of company personnel policies, along with excerpts from depositions and internal memoranda, demonstrate that the policies regarding reductions in force were developed and directed from the highest corporate levels of Xerox (Attachment C).

Throughout the investigation and conciliation, Xerox has maintained that a massive reduction in its workforce was necessary to reduce costs and that this reduction was accomplished by voluntary terminations and through the use of objective criteria for the necessary periodic involuntary terminations. However, the evidence shows that from 1980 through 1983, Xerox actually hired many more employees than the number who left. 1/ College recruitment and hiring continued throughout the period. New college hires were put into the same engineering and sales jobs from which older employees were being terminated. But an explicit Xerox policy protected these new hires from subsequent RIFs, a policy which itself is a violation of the ADEA, see Williams v. General Motors Corp., supra. Rather than reducing the number of employees, Xerox was replacing the older, more highly-paid professionals with new hires who are much younger. Several former high level Xerox officials have independently described a pattern of directives orally issued to midlevel managers at meetings that they must get rid of the "old-timers" and that they must "counsel out" these employees.

Xerox's actions constituted both disparate treatment of older workers (they were riffed because of their age) and disparate impact on older workers (individuals were riffed because of their pay level, a policy that disproportionately impacted on protected older workers). The same action may often be analyzed under either theory. Geller v. Markham, supra.

Voluntary reductions in force (VRIFs)(with an offer of outplacement assistance and in some cases vesting in pension rights accomplished by amortization of severance pay, in addition to severance pay due all laid-off employees based on tenure) were always followed by an involuntary RIF (IRIF). Older workers were "counselled" that failure to take the "voluntary" offer would result in termination with no benefits. Managers in divisions about to undertake reductions in force were instructed to advise the targetted older workers that this offer would not be made again. At the same time, lists were drawn up showing those who were "vulnerable" in the next IRIF. At issue in particular is the Bridge to Retirement program which was made available to employees aged 51 1/2 with eight or more years tenure. Under the program, they could amortize the 15 months severance pay they were due for a 30 month pay-out, thus in some cases ensuring that they would vest in the corporate pension plan (which had 10-year cliff vesting, the least generous allowed under law), and ensuring their rights to some pension benefits; in other cases vesting had already occurred, but in both cases, the benefit resulting from this program constituted a very small proportion of benefits that would have been obtained had the employees been allowed to work to 60 or 65. There is extensive evidence that those eligible for the program were told that if they did not take it voluntarily, they would be involuntarily terminated in the next IRIF and would get no benefits.

The evidence reveals a deliberate Xerox policy to rid itself of its older workers, dating from 1982. We fully expect that during discovery we can obtain similar evidence regarding the post 1983 time period.

1/ The computerized personnel records obtained by the EEOC from Xerox present data only until December 31, 1983, the date immediately prior to the EEOC's first request for information. Xerox has refused to furnish updated personnel data.

Because the official Xerox policy concerning reductions in force is to choose those for termination who have the lowest tenure, absent age discrimination we would expect that the majority of terminees would be younger, newer employees. Instead, we have found that not only were most terminees over 40 but that the proportion of terminees over 40 was consistently significantly larger compared to their presence in the Xerox workforce. This was not only true for "voluntary" RIFs; an internal Xerox analysis of RIFs in the Reprographic Business Group shows that persons over 40 were a disproportionately large segment of even the IRIFs (Attachment D).

Analysis of computerized personnel records supplied by Xerox shows that from 1980 through 1983 Xerox RIFed 2598 salaried personnel 2/ who were aged 40 or more at termination, while 22,768 persons under 40 were hired for the same job categories. In 1983, the specific period on which our proposed lawsuit focuses, 559 persons were RIFed, of whom 65.5% were over 40. During the same year, there were 5711 new hires, only 6.7% of whom were over 40. The average age of those hired in 1983 was 27 years old, while the average age of those terminated in Xerox's reduction in force programs was 45. Those terminated had an average salary of $31,770; those hired had an average salary of $18,660. The Commission's investigation has confirmed that many of these new hires filled exactly the same positions as those older workers were leaving.

Presented immediately below is an analysis of the age of the Xerox workforce in the years 1980-83, compared to the average age of those riffed, either "voluntarily" or involuntarily. The last column indicates the number of standard deviations from the expected proportion the actual proportion of riffed employees over 40 represents. The "expected" proportion is that proportion that they would be absent discrimination.3/

COMPARISON OF PERCENT OF XEROX WORKFORCE OVER 40
AND INDIVIDUALS RIFFED, FOR EACH YEAR 1980-83

	% OF TOTAL COMPRISED OF PERSONS OVER 40				# S.D.
YEAR	WORKFORCE	IRIF	VRIF	TRIF	USING TRIFS
1980	29.52	52.10	85.71	66.01	11.40
1981	30.96	42.47	46.34	45.71	10.85
1982	32.11	43.36	80.92	62.03	32.24
1983	35.92	54.83	76.95	65.47	14.56

The major job categories affected by the RIFs were engineering, sales and sales management, support services, editorial and publishing positions, technical and customer service, scientific and research positions. There were 47 RIFs in Engineering in 1983, while at the same time there were 325 new hires. The average age of the new hires was 28.5, while the average age of those RIFed was 46.2. During that year, there were also 21 RIFs in Sales and Sales Management, while there were 1441 hires in this category. Throughout the period Xerox advertised extensively in major newspapers around the country for applicants for sales positions. The ads typically sought persons with "from two to four years" experience. Presented below is a comparison of the workforce with those RIFed, by the percentage of persons over 40 in each category.

2/ We have used Total RIFS which are the combined voluntary and involuntary RIFs, due to the lack of "voluntariness" evident in the operation of the program.

3/ The report of the expert statistician retained by plaintiffs in the Lusardi case presents extensive analyses of the effects of Xerox's RIFs and is available for examination. The statistical analyses presented here are drawn from that report.

COMPARISON OF PRESENCE OF WORKERS OVER 40 IN XEROX WORKFORCE AND AMONG RIFs BY JOB TYPE, 1980-83

Job Type	Percent Over 40 Years Old Workforce	IRIF	VRIF	TRIF
Sales and Sales Management	19.01	38.71	84.40	63.02
Finance/ Accounting	25.48	39.55	49.24	45.33
Marketing	33.65	44.94	49.65	47.04
Engineering Support	47.87	58.33	81.63	71.26
Engineering	49.82	50.59	72.79	64.46
Technical Customer Service	25.43	48.10	63.68	59.11
Editorial and Publishing	48.09	40.91	88.46	66.67
Scientific and Research	41.07	43.01	77.44	64.98

The average of of those RIFed for the period 1980-83 was 43.54 years. The average age of those hired was 27.97 years.

While the statistical analysis shows a marked pattern of disproportionate impact on employees over 40, at issue is whether those persons categorized by the company as voluntary RIFs truly volunteered. Xerox has, in its presentations to the EEOC and in defense of the private lawsuit, omitted so called "voluntary RIFs" as it asserts that those who left in this category could not have been discriminated against since leaving Xerox was their choice. Repeated requests to Xerox to furnish the names of the persons it contends were voluntary RIFs, so that Xerox's assertions could be verified, have been refused. While surely some who left were truly voluntary, the evidence is persuasive that many who were termed as voluntary RIFs by Xerox only left as a result of coercion. We may assume that the known difficulties in finding employment for relatively low-level employees around 50 years with the threat of no outplacement assistance made voluntary termination particularly necessary. We have therefore analyzed all RIFs together.

Even when only involuntary RIFs are examined, however, the evidence reveals that older workers were disproportionately targetted for termination. Sometimes this targetting was based on purportedly "objective" criteria. For instance, Xerox developed a matrix of tenure and performance that it used to categorize persons in engineering divisions. The cells in this "objective" system, however, are not arranged to give equal consideration to those with most tenure. Further, the newer college-recruited hires were not even put in the matrix; they were exempt altogether from RIF for two years. Xerox could not provide any objective rationale or method for its arrangement of cells in this matrix.

Victim Identification

Persons in the known prospective plaintiff group were terminated from Xerox during the period from April 1, 1983 to July 30, 1984. All but 15 of the group were terminated in 1983. Most of the group members worked for the Reprographic Business Group in Webster, New York, in which massive RIFs took place in late 1982 and early 1983. These RIFs continued at a slower rate throughout 1983.

The known 48 individuals previously referenced on page 3, supra, have come to our attention through their efforts to join the private lawsuit and their charges of discrimination filed with the Commission. Although we have received extensive computerized personnel records, Xerox excised the names and other identifying information about employees from these records, and has consistently refused to furnish the names of its employees or former employees so there is no practical way to identify individuals who have not come forward on their own. It is expected that during discovery additional individuals who allege discrimination on the basis of age will be identified. The number of additional potential plaintiffs is estimated to be a maximum of 150.

The group for whom relief was sought during conciliation and who would be plaintiffs in the lawsuit proposed here includes former engineers, managers, sales persons and clerical workers. Most of these former employees allege that they were forced to resign or retire when they were given the choice of taking a "voluntary" (with or without Bridge to Petirement, depending on their ages) RIF program or being involuntarily RIF'd with no outplacement benefits. The group also includes several who were terminated involuntarily when divisions or plants closed or functions were moved elsewhere; in addition, there are four former employees of the U.S. Insurance Group, a Xerox subsidiary, who were fired with the allegation that their performance was inadequate. Data received indicates that these allegations were unfounded.

Anecdotal Evidence

Typical of the allegations of age discrimination from the Reprographic Business Group in Webster, New York is the experience of a former business analyst. Mr. B., who worked in the accounting division of the RBG, at 53 was the oldest professional employee of 15 in his unit. After the announcement that the unit had to be reduced by three professional employees, Mr. B.'s manager told him that he was vulnerable to the involuntary RIF which was coming and that his only chance to get severance benefits was to take the early retirement program being offered. Mr. B had organized the unit several years before and had consistently received above average performance evaluations. There was no allegation that his performance was deficient in any way. However, Mr. B.'s manager told him that instructions had been given that he, the manager, was to get Mr. B. to leave. Although Mr.B. had the longest tenure in his department, he was the only one in the unit to leave the company at that time. The only two others in the department who were over 50 were initially moved to other departments and left during a subsequent RIF. The 53 year old business analyst was replaced by a person in his early forties. Although the official Xerox policy is to transfer employees rather than terminate them, the open position to which Mr. B. sought to transfer was filled by a less qualified employee who was in his thirties. This is persuasive evidence of age discrimination. See *Williams* v. *General Motors Corp., supra*, at 1387. Mr. B.'s "voluntary" early retirement has resulted in the loss of about two thirds of the retirement benefit he would have received had he worked until 65, when he planned to retire. He was out of work for 2 years and the job he was able to get pays $12,000 less than his job at Xerox. He will not recover the retirement income he had been planning on from his work at Xerox.

The experience of another 53 year old terminated account executive is typical for the employees who took the Bridge to Retirement option. Mr. H. had worked for Xerox in its New York sales office for 20 years. For 18 of those years he had been a member of the President's Club (composed of employees who exceed their sales goals for the year). His last three performance ratings were 4's and 5's in a 5 point rating system. Nothing in Mr. H.'s record indicates that he was not a consistently good performer. He states categorically that he did not want to retire when he was asked to do so by his supervisor. However, he saw how "old timers" in his division were being assigned to unfamiliar and inferior territories in which they were unable to achieve their sales quotas. He felt that he had no alternative but to take the "voluntary" bridge to retirement option. He had planned to work until he was 65. As a result of his forced early retirement his life insurance was reduced from a $300,000 policy to $5,000, his medical benefits were reduced, his social security benefits will be reduced as a result of his lower earnings, and his benefit plan from Xerox, which was based on age 65 retirement, is much less than it would have been had he been allowed to continue working there. Although he is again working for another company, he has had to take a $27,000 pay cut.

The facts belie Xerox's assertion that those it terms "voluntary RIFs" chose to leave because some better alternative was open to them. Many of those in the group of prospective plaintiffs remain unemployed or have taken jobs which pay much less than they made at Xerox. Several have lost their houses, moved across the country to find work, and have been unable to continue to send their children to college. It is clear that the current economic circumstances of the prospective plaintiffs could hardly have been chosen voluntarily.

VII. CONCLUSION

In considering whether employers have violated the ADEA, courts have consistently held that in order to establish a prima facie case of age discrimination, terminated employees do not have to show they were replaced in exactly the same job. They must show only that there were jobs available which they were qualified to perform and that younger persons were treated more favorably. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 82 (2nd Cir. 1983). We have extensive evidence here that many prospective plaintiffs were replaced by a younger person in exactly the same job. There were many other jobs which they were qualified to perform and which were being filled regularly by younger new hires.

Plaintiffs may use both statistical evidence, which raises an inference of discrimination, and direct evidence to establish a prima facie case that their termination was based on age. EEOC v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980). In the Sandia case, as here, the employer undertook a reduction in force in order to lower its personnel costs. Sandia's purportedly objective system for ranking employees to be terminated was found to be illegally biased against its older workers. This practice, also undertaken at Xerox, along with Xerox's protection of young workers from RIF, provides a strong case that Xerox's preference was for young workers. The fact that young workers earn less money does not make the action legal. It is not a "factor other than age" when the higher pay of older workers in inextricably bound with their age. Geller v. Markham, and other cited cases, supra.

As the agency charged with enforcement of the ADEA, the Commission has an obligation to be involved in important cases to the extent that it can help shape the development of case law and can insure that victims of illegal age discrimination are afforded appropriate relief. Although the number of persons in the prospective class is small here, the issue of forcing older workers out in order to save money is an important one of topical interest and wide implications in American society.

In addition, allegations of age discrimination by Xerox have been highly visible. The Commission's investigation and Letter of Violation, along with the private lawsuit against Xerox, have been widely reported in newspapers around the country. During our investigation and conciliation we have received frequent bipartisan congressional inquiries as to the progress of our action in resolving the allegations of age discrimination against Xerox.

Based on the evidence that Xerox developed and implemented a deliberate corporate policy which resulted in a pattern of wilfull violations of the Age Discrimination in Employment Act, and upon the unwillingness of Xerox to conciliate within the requirements of the Act, we recommend that the Commission approve the filing of the attached complaint.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 5, 1987

Christina E. Clayton, Esquire
Assistant General Counsel
Personnel and Environmental Health
& Safety
Xerox Corporation
P.O. Box 1600
Stamford, Connecticut 06904

Re: EEOC v. Xerox Corporation

Dear Ms. Clayton:

We have received your letter of January 20, 1987. You feel we had reached a tentative agreement at our meeting on January 14, 1987. It is the Commission's understanding, based upon your letter, that Xerox will agree only to a tolling of the statute with regard to the individuals who have complained to the Commission and whose claims are being represented by us for purposes of conciliation. In return for this agreement, Xerox would, as soon as practical, but within three months, submit to the Commission the information that we requested in our letter of September 11, 1986, provided that the information requested is deemed by Xerox to be relevant, and such information is allowable under Rule 26 of the Federal Rules of Civil Procedure (F.R.C.P.).

With regard to the meeting which was held on January 14th, it was not our understanding that any tentative agreement had been reached. It was our understanding that you and the other Xerox representatives would return to Stamford and inquire from higher management whether it would be willing to agree to a general tolling of the Statute while conciliation efforts continued. If Xerox was willing to agree to that contingency, the Commission would provide the names of approximately 100 former Xerox employees. Xerox would, on a "rolling" basis, (to be completed within 3 months) provide the Commission with the information requested in our September 11, 1986 letter, provided the information requested was allowable under Rule 26, F.R.C.P. Upon receipt of this information, and any other position statement or information provided by Xerox, the Commission would analyze each claim and facilitate further discussions with Xerox on those claims and on the various practices which the Commission believes violate the Age Discrimination in Employment Act (ADEA).

Your letter makes it clear that there were different understandings reached at the January 14th meeting. You, also, appear to have clarified your position at that meeting by insisting upon unilateral determination by Xerox of whether information requested by the Commission is relevant. It was specifically asked at the meeting whether the scope of your determination to send the information requested was limited to the parameters of Rule 26, F.R.C.P. The response to the question was "yes."

This supplementation and Xerox's refusal to agree to a general tolling illustrate why it appears that further conciliation efforts will be futile. At this point, we believe it will be helpful to capture in this one letter the Commission's view and position on the processing of this charge to date.

On February 7, 1984, the Commission issued a letter commencing a directed investigation into possible ADEA violations. This investigation was triggered by a large number of charges that had been filed with the Commission around the country by individuals claiming to be adversely affected. Those alleged violations revolved around Xerox's series of programs designed to reduce through voluntary and involuntary means its labor force (RIFs).

The Commission conducted its investigation recognizing that the Statute of Limitations was running on all individual claims. To conduct its investigation, the Commission had included a detailed request for information in its February 7th letter. The Commission received some non-statistical general information on charging parties and policies in March, 1984. Xerox did not provide the crucial statistical and computerized data requested by the Commission at that time. Xerox complained about the volume of that information and specified that it would take a minimum of 26 weeks to provide that information to the Commission.

When some of that information was produced by Xerox in July of 1984, it was critically incomplete. Despite assurances by Phil Smith and others from Xerox that it contained all of the codes necessary to analyze the information, family job codes were missing. Lower level Xerox personnel verbally confirmed that they knew that all of the information (including the family job codes) was not produced. It was not until September, 1984, that Xerox supplied readable computer records.

During the time the Commission was experiencing the frustration of ascertaining the completeness of the information provided by Xerox, and trying to analyze that information, it also interviewed the charging parties and a large number of other former Xerox personnel, including an individual who assisted in the designing of the reduction in force plans. Their collective testimony indicated that the RIFs were implemented in an overwhelmingly involuntary fashion, and were designed to hit older workers the hardest. The Commission obtained copies of memoranda, one of which was presented to Xerox, which indicated that the programs were aimed at replacing longer tenured, higher paid employees of Xerox with lower cost new hires.

The Commission analyzed all of the information that Xerox had provided pursuant to the Commission's initial request for information. Our analysis revealed a disproportionate impact on protected age group members, both with regard to voluntary and involuntary terminations.

The above specified information from witnesses and Xerox, the failure of Xerox to provide all of the information specifically requested by the Commission (particularly the Commission request for the names, addresses and telephone numbers of all former Xerox employees who "voluntarily" resigned from Xerox during the period of time covered by the Commission's request), the receipt of misinformation concerning the completeness of the information presented by Xerox, along with the quickly passing statute of limitations, led to the issuance by the Commission of a Letter of Violation on April 19, 1984.

Xerox should note, and this point is important, the level of proof in an investigation is "reasonable cause" to believe that discrimination exists. This burden is an administrative one and is a significantly lesser burden than that imposed by a trial court. This burden was satisfied by weighing all aspects of the investigation that was completed within the time frames with which the Commission must comply to avoid sacrificing any potential claimant's rights. Xerox's own actions, inactions and delays contributed to our findings.

Further, the Commission wants Xerox to be abundantly clear on what was found. The Commission has found that Xerox engaged in a series of programs which violated the ADEA by involuntarily (or with the use of undue influence) operated to disproportionately terminate employees over the age of forty, and most particularly those over the age of fifty. These programs are diverse. The Commission does not know all of these programs because of the restrictions imposed by Xerox on what information it would release to the Commission. However, the Commission has reasonable cause to believe that there are several such programs. These programs have discriminated in their aim and in their implementation.

We continue to regard the issues here to be those of a pattern and practice of age discrimination, rather than a series of individual events. We regard the complaints of individuals who have come to our attention to be examples of policies and widespread practices that originated at Xerox Headquarters and were implemented in local facilities nationwide.

The Commission has not placed any artificial limitation on the time period during which Xerox has engaged in these practices. Any supposed limitation has been created by Xerox. It is without foundation, and not the result of anything the Commission has proffered.

We feel that we have made ample attempts to conciliate our findings. We held several meetings with Xerox in 1984, during which Xerox was permitted to present its position and view of its RIF programs. We listened, considered what was presented, but heard nothing that would justify altering our findings. Specifically, the Company's presentation on September 12, 1984 was overly simplistic and drawn against only two broad categories of age groups. The presentation solidified our finding that there were programs (eg., the bridge to retirement program) which were clearly, by definition, aimed at older workers, and which were implemented in a discriminatory fashion. Xerox's position concerning the "voluntariness" of the programs was in direct contradiction to hundreds of interviews of former employees. Moreover, Xerox's refusal to provide the Commission with the names of "voluntary RIFs" lent further incredibility to Xerox's position. We firmly believe that a good many, if not most of these "voluntary" terminations were not voluntary, but were involuntary.

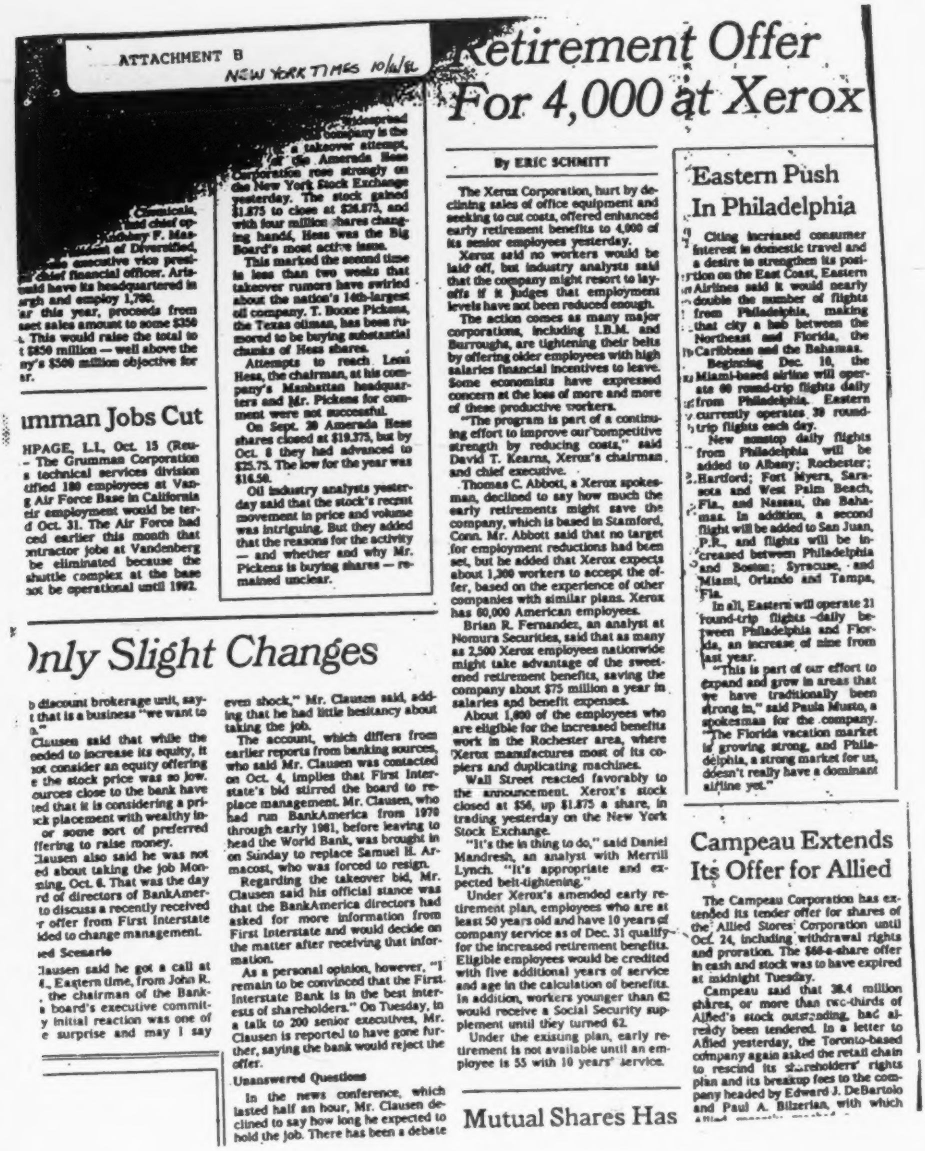
We held additional meetings, and telephone conversations with representatives from Xerox. In a last effort to resolve this matter, the Commission offered to provide the names of potential victims, in exchange for certain information pertaining to them and similarly situated individuals and a general tolling of the Statute. This has been rejected by Xerox. Xerox has said it refuses to conciliate on the "voluntary RIF program." Moreover, Xerox continues to insist that there is no issue of pattern and practice discrimination, but merely, perhaps, isolated instances.

In a nutshell, for conciliation purposes only, the Commission insists upon Xerox making offers of reinstatement to the persons for which the Commission is willing to provide names who were adversely affected by Xerox's policies, making back pay arrangements to these individuals, adjusting pension and other benefits, and eradicating all policies and practices which operate to involuntarily terminate protected age group workers. We would also insist upon a general tolling of the statute of limitations for all victims since March 31, 1983. We, again, offer these parameters to Xerox. If within five (5) days of the receipt of this letter, Xerox has not accepted these general terms, we have no alternative but to deem conciliation to have failed pursuant to Section 7(b) of the ADEA, and Systemic Litigation Services will seek authority from the Commissioners to file suit.

Sincerely,

James H. Finney

James H. Finney
Associate General Counsel
Systemic Litigation Services



ATTACHMENT B
NEW YORK TIMES 10/16/86

[illegible] Chemicals, [illegible] and chief op- [illegible] Anthony F. Mas- [illegible] of Diversified, [illegible] executive vice presi- [illegible] chief financial officer. Aris- would have its headquartered in argh and employ 1,700.

ar this year, proceeds from asset sales amount to some $350 . This would raise the total to t $850 million — well above the ny's $500 million objective for ar.

umman Jobs Cut

HPAGE, L.I., Oct. 15 (Reu- – The Grumman Corporation s technical services division tified 180 employees at Van- g Air Force Base in California eir employment would be ter- d Oct. 31. The Air Force had ced earlier this month that ontractor jobs at Vandenberg be eliminated because the shuttle complex at the base not be operational until 1992.

[illegible] idespread [illegible] company is the [illegible] a takeover attempt, [illegible] of the Amerada Hess Corporation rose strongly on the New York Stock Exchange yesterday. The stock gained $1.875 to close at $26.875, and with four million shares changing hands, Hess was the Big Board's most active issue.

This marked the second time in less than two weeks that takeover rumors have swirled about the nation's 14th-largest oil company. T. Boone Pickens, the Texas oilman, has been rumored to be buying substantial chunks of Hess shares.

Attempts to reach Leon Hess, the chairman, at his company's Manhattan headquarters and Mr. Pickens for comment were not successful.

On Sept. 29 Amerada Hess shares closed at $19.375, but by Oct. 8 they had advanced to $25.75. The low for the year was $16.50.

Oil industry analysts yesterday said that the stock's recent movement in price and volume was intriguing. But they added that the reasons for the activity — and whether and why Mr. Pickens is buying shares — remained unclear.

)nly Slight Changes

o discount brokerage unit, say- t that is a business "we want to a."

Clausen said that while the eeded to increase its equity, it not consider an equity offering e the stock price was so low. ources close to the bank have ted that it is considering a pri- ck placement with wealthy in- or some sort of preferred ffering to raise money.

Clausen also said he was not ed about taking the job Mon- ning, Oct. 6. That was the day rd of directors of BankAmer- to discuss a recently received r offer from First Interstate ided to change management.

ed Scenario

Clausen said he got a call at 4., Eastern time, from John R. , the chairman of the Bank- a board's executive commit- y initial reaction was one of e surprise and may I say even shock," Mr. Clausen said, adding that he had little hesitancy about taking the job.

The account, which differs from earlier reports from banking sources, who said Mr. Clausen was contacted on Oct. 4, implies that First Interstate's bid stirred the board to replace management. Mr. Clausen, who had run BankAmerica from 1970 through early 1981, before leaving to head the World Bank, was brought in on Sunday to replace Samuel H. Armacost, who was forced to resign.

Regarding the takeover bid, Mr. Clausen said his official stance was that the BankAmerica directors had asked for more information from First Interstate and would decide on the matter after receiving that information.

As a personal opinion, however, "I remain to be convinced that the First Interstate Bank is in the best interests of shareholders." On Tuesday, in a talk to 200 senior executives, Mr. Clausen is reported to have gone further, saying the bank would reject the offer.

Unanswered Questions

In the news conference, which lasted half an hour, Mr. Clausen declined to say how long he expected to hold the job. There has been a debate

Retirement Offer For 4,000 at Xerox

By ERIC SCHMITT

The Xerox Corporation, hurt by declining sales of office equipment and seeking to cut costs, offered enhanced early retirement benefits to 4,000 of its senior employees yesterday.

Xerox said no workers would be laid off, but industry analysts said that the company might resort to layoffs if it judges that employment levels have not been reduced enough.

The action comes as many major corporations, including I.B.M. and Burroughs, are tightening their belts by offering older employees with high salaries financial incentives to leave. Some economists have expressed concern at the loss of more and more of these productive workers.

"The program is part of a continuing effort to improve our competitive strength by reducing costs," said David T. Kearns, Xerox's chairman and chief executive.

Thomas C. Abbott, a Xerox spokesman, declined to say how much the early retirements might save the company, which is based in Stamford, Conn. Mr. Abbott said that no target for employment reductions had been set, but he added that Xerox expects about 1,300 workers to accept the offer, based on the experience of other companies with similar plans. Xerox has 60,000 American employees.

Brian R. Fernandez, an analyst at Nomura Securities, said that as many as 2,500 Xerox employees nationwide might take advantage of the sweetened retirement benefits, saving the company about $75 million a year in salaries and benefit expenses.

About 1,600 of the employees who are eligible for the increased benefits work in the Rochester area, where Xerox manufactures most of its copiers and duplicating machines.

Wall Street reacted favorably to the announcement. Xerox's stock closed at $56, up $1.875 a share, in trading yesterday on the New York Stock Exchange.

"It's the in thing to do," said Daniel Mandresh, an analyst with Merrill Lynch. "It's appropriate and expected belt-tightening."

Under Xerox's amended early retirement plan, employees who are at least 50 years old and have 10 years of company service as of Dec. 31 qualify for the increased retirement benefits. Eligible employees would be credited with five additional years of service and age in the calculation of benefits. In addition, workers younger than 62 would receive a Social Security supplement until they turned 62.

Under the existing plan, early retirement is not available until an employee is 55 with 10 years' service.

Eastern Push In Philadelphia

Citing increased consumer interest in domestic travel and a desire to strengthen its position on the East Coast, Eastern Airlines said it would nearly double the number of flights from Philadelphia, making that city a hub between the Northeast and Florida, the Caribbean and the Bahamas.

Beginning Dec. 10, the Miami-based airline will operate 60 round-trip flights daily from Philadelphia. Eastern currently operates 30 round-trip flights each day.

New nonstop daily flights from Philadelphia will be added to Albany; Rochester; Hartford; Fort Myers, Sarasota and West Palm Beach, Fla., and Nassau, the Bahamas. In addition, a second flight will be added to San Juan, P.R., and flights will be increased between Philadelphia and Boston; Syracuse, and Miami, Orlando and Tampa, Fla.

In all, Eastern will operate 21 round-trip flights daily between Philadelphia and Florida, an increase of nine from last year.

"This is part of our effort to expand and grow in areas that we have traditionally been strong in," said Paula Musto, a spokesman for the company. "The Florida vacation market is growing strong, and Philadelphia, a strong market for us, doesn't really have a dominant airline yet."

Campeau Extends Its Offer for Allied

The Campeau Corporation has extended its tender offer for shares of the Allied Stores Corporation until Oct. 24, including withdrawal rights and proration. The $66-a-share offer in cash and stock was to have expired at midnight Tuesday.

Campeau said that 38.4 million shares, or more than two-thirds of Allied's stock outstanding, had already been tendered. In a letter to Allied yesterday, the Toronto-based company again asked the retail chain to rescind its shareholders' rights plan and its breakup fees to the company headed by Edward J. DeBartolo and Paul A. Bilzerian, with which

Mutual Shares Has

ATTACHMENT C

CSO FIELD STRUCTURE

TASK FORCE

- OBJECTIVE
  - CENTRALIZED/CONSOLIDATE CUSTOMER SUPPORT FUNCTIONS (ADMIN., WORK SUPPORT, FIELD TRAINING, EQUIPMENT CONTROL, AFTER SALE SERVICES) OUT OF BRANCHES AND INTO 10 REGION CITIES.
- PILOT IN DALLAS IN 1983, NATIONAL LAUNCH IN 1984/85.
- ON GOING SAVINGS ... $26 MILLION (HEADCOUNT REDUCTIONS AND RIFFING HIGHER PAID/MORE TENURED PEOPLE WITH GRADE 3 ENTRY LEVEL)
- ONE TIME IMPLEMENTATION COST ... $30 MILLION (CONTINUANCE, RELOCATION, TRAINING)
- NET SAVINGS/COST:

1983/84	1985	1986
$ (14.8)	$ 8.3	$ 25.0

- LOW COST CITIES ALTERNATIVE RESULTS IN ADDITIONAL ANNUALIZED SAVINGS OF $9M. THIS RESULTS IN 85% INEXPERIENCED PEOPLE VERSYS 55% UNDER THE REGION CITY PROPOSAL.
- REMAINING BRANCH ORGANIZATION WOULD BE SALES/TECHNICAL SERVICE.

11/11/82
DY 1:8:cb

Exhibit "E" - page 1

BUSINESS SYSTEMS GROUP
1983/1984 OPERATING PLAN
MANPOWER REVIEW

THEMES

- SUBSTANTIAL HEADCOUNT REDUCTIONS TAKEN, ESPECIALLY IN REPROGRAPHICS.

- REPROGRAPHICS ACTIONS REPRESENT 16% HEADCOUNT REDUCTION SINCE 1981; PRODUCTIVITY GREATER THAN THAT LEVEL DUE TO OFFSETTING VOLUME GROWTH.

- ACTIONS TAKEN INCLUDE RHQ RESTRUCTURE, LOW COST HIRES HIRING LIMITATIONS. ←

- FURTHER PRODUCTIVITY PLANNED FOR 83/84 - ISSUE IS REALISM OF FURTHER TASKS BEYOND THOSE PLANNED.

- OTHER BUSINESS GROWTH MUST BE EVALUATED ON A BUSINESS-BY-BUSINESS BASIS AND APPROPRIATE DECISIONS REACHED.

- FUNCTIONAL HEADCOUNT LEVELS MIRROR OVERALL REDUCTIONS.

XEROX CONFIDENTIAL

Xerox Private Data

MANPOWER PLANNING PROCESS

1. REVIEW YOUR REVISED MANPOWER CEILINGS, WHICH REFLECT ACHIEVEMENT OF A 0.8 TO 1.0 TARGET RATIO BY SEPTEMBER 13, 1982.

2. DETERMINE AN ORGANIZATIONAL STRUCTURE, FOR YOUR RESIZED BUSINESS, WHICH ALLOWS YOU TO MAINTAIN QUALITY, COST EFFECTIVENESS AND SCHEDULE.

   a. **MANAGEMENT**

   PARTICULAR ATTENTION SHOULD BE FOCUSED ON ELIMINATING LEVELS OF MANAGEMENT AND INCREASING SPANS OF CONTROL.

   b. **INDIVIDUAL CONTRIBUTORS**

   CONSIDER NECESSARY STAFFING LEVELS AND GRADE LEVEL DISTRIBUTION IN EACH GENERIC JOB FAMILY, e.g., NUMBER OF FOREMAN, ENGINEERS, EXPEDITORS, SECRETARIES, ETC.

3. IDENTIFY AND LIST THE SKILL REQUIREMENTS FOR POSITIONS IN THE NEW/RESIZED ORGANIZATION. THESE REQUIREMENTS SHOULD INCLUDE TECHNICAL, ADMINISTRATIVE AND MANAGERIAL SKILLS AS APPROPRIATE.

4. SELECT EMPLOYEES TO STAFF POSITIONS/REQUIREMENTS IN YOUR NEW/RESIZED ORGANIZATION.

   - CONSIDER EMPLOYEES:
     - SKILL KNOWLEDGE, UNIQUENESS AND FLEXIBILITY
     - PAST EXPERIENCES AND EDUCATION
   - IN ADDITION, FOR MANAGEMENT POSITIONS ALSO CONSIDER EMPLOYEES:
     - HUMAN RESOURCE MANAGEMENT/ADMINISTRATIVE SKILLS
     - ABILITY TO ACHIEVE RESULTS IN COST EFFECTIVE MANNER.

5. IDENTIFY EMPLOYEES YOU WOULD PREFER TO SEE LEAVE THE COMPANY e.g., WEAK/MARGINAL PERFORMERS, LIMITED GROWTH POTENTIAL, LACK OF/LIMITED SKILLS NECESSARY IN RESIZED ORGANIZATION, ETC.

   - DEVELOP CONSTRUCTIVE, NON-THREATENING, PLANS TO ENCOURAGE/COACH THESE IDENTIFIED EMPLOYEES TO CONSIDER VOLUNTARY REDUCTION IN FORCE.
   - EXPLAIN THE DIFFERENCES BETWEEN VRIF AND RIF OPTIONS/BENEFITS.

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Xerox
Private
Data

MANPOWER PLANNING PROCESS

6. DEVELOP YOUR PRELIMINARY REDUCTION IN FORCE (RIF) LIST USING THE PERFORMANCE/SERVICE MATRIX.

7. SCRUTINIZE YOUR RIF LIST TO REMOVE ESSENTIAL EMPLOYEES, i.e., THOSE YOU NEED TO RUN THE RESIZED BUSINESS (AS IDENTIFIED IN STEP 4).

   - REVIEW YOUR LIST OF ESSENTIAL EMPLOYEES AND DOCUMENT THEIR RIF EXCLUSION AS "CRITICAL SKILLS", "HIGH POTENTIAL" OR "RECENT NEW COLLEGE HIRE".

8. REVISE YOUR PRELIMINARY RIF (DEVELOPED STEP 6) LIST TO COMPENSATE FOR YOUR REMOVALS IN STEP 7.

   a. MANAGEMENT

   - ENSURE APPROPRIATE NUMBER OF MANAGERS HAVE BEEN IDENTIFIED TO REFLECT ELIMINATION OF ORGANIZATIONAL LEVELS AND INCREASE SPANS OF CONTROL. SURPLUSED MANAGERS WILL BE EITHER REASSIGNED/DOWNGRADED OR RIFED BASED ON GUIDELINES AVAILABLE FROM YOUR PERSONNEL MANAGER.

   - YOUR RESIZED ORGANIZATIONAL STRUCTURE WILL BE REVIEWED BY SENIOR DIVISION MANAGEMENT TO ASSURE APROPRIATE MANAGEMENT REDUCTIONS HAVE BEEN PLANNED.

   b. INDIVIDUAL CONTRIBUTORS

   - ENSURE APPROPRIATE NUMBER OF INDIVIDUAL CONTRIBUTORS - BY VARIOUS GENERIC JOB FAMILIES - HAVE BEEN IDENTIFIED.

9. FOLLOWING THE VOLUNTARY REDUCTION IN FORCE APPROVALS, DEVELOP YOUR OFFICIAL RIF LIST, GIVING APPROPRIATE CONSIDERATION TO THE PERFORMANCE/SERVICE MATRIX, CRITICAL SKILLS, HIGH POTENTIALS, RECENT NEW COLLEGE HIRE EXCLUSIONS AND PROTECTED CLASS REPRESENTATIONS.

10. SUBMIT YOUR FINAL RIF LIST TO DIVISION PERSONNEL FOR CONSOLIDATION AND MANAGEMENT REVIEW/APPROVAL.

[illegible]

XEROX

Internal Memo

CONFIDENTIAL

I-C

To

Personnel Directors

From

E. P. Runge

Personnel
STHQ. 1-2-D
8*344-3788

Subject

CPC Presentation
– Personnel Strategic Plan

Date

January 19, 1982

Attached for your information is an updated version of the Personnel Strategic Plan which was sent to the members of the CPC in advance of Doug's presentation scheduled for January 25. If you have any questions, do not hesitate to call.

EPR/lh
attachment

RECEIVED
JAN 21 1981
J. L. JONES

"Maturing/Aging Workforce in Parts of the Reprographics Business"

Xerox Private Data

CONFIDENTIA

STRATEGIC PLANNING FACTORS
(CONT'D)

XEROX WORKFORCE CHARACTERISTICS

- MATURING/AGING WORKFORCE IN PARTS OF THE REPROGRAPHICS BUSINESS
  - MONROE COUNTY

	AVERAGE AGE
- MANUFACTURING EXEMPTS/HOURLIES	41
- ENGINEERING EXEMPTS	40
- VS. TOTAL U.S. OPERATIONS	36
- VS T/R's	33

  - AVERAGE AGE MAY INCREASE AS A RESULT OF 1981 R.I.F./HIRING CONSTRAINTS
- WELL EDUCATED BUT TEND TO BE OVER-SPECIALIZED BY FUNCTION
- HIGH EXPECTATIONS
  - BASED ON XEROX DRAMATIC GROWTH AND MANAGEMENT PHILOSOPHY
  - SUPPORTED BY HIGH PROMOTION RATES (APPROXIMATELY 25% IN U.S. FOR 1980 AND 1981) AND HIGH PAY

SKILL REQUIREMENTS OF THE MATERIALS COST ENGINEER TO EFFECTIVELY SUPPORT NEW PROGRAMS UNDER ABSOLUTE COST CONTROL

(CONTINUED)

- AGE LEVELS IN PE AND PCE ARE A CONSTRAINT IN HANDLING NEW ROLE
  - US PE AND PCE MECHANICAL AVERAGE AGE OF 54+
  - NEW BLOOD NEEDED, PARTICULARLY IN MECHANICAL

VRIF COMMUNICATIONS GUIDELINES

TO RETIREMENT ELIGIBLE POPULATION

The intent is to make sure they understand the positive nature of what is being offered. There is a good possibility that the salary continuance bridge to retirement option may not be offered again, especially with the additional three months of pay. All employees eligible for retirement under the 10/6/82 VRIF Package should give serious consideration to their future plans in light of this option. Management, in turn, will accept and approve virtually all applications for the VRIF.

TO ALL GRADE 10's AND ABOVE

This group should understand a message similar to the above, i.e., substantial salary continuance via the VRIF may not be offered agian. In addition, it should be made clear that the grade 10 and above population will be affected significantly by the pending RIF. Each individual should understand that there is IRIF jeopardy and that management will accept and approve virtually all applications for the VRIF.

Recommended Process: Each senior staff manager should assemble the above populations (separately or together) to discuss the above. At management discretion, individual "encouragement" sessions may be held. In all cases, individuals with questions or concerns should be handled by the appropriate manager or referred to Personnel.

CONFIDENTIAL

ATTACHMENT D

REPROGRAPHIC BUSINESS GROUP
REDUCTION IN FORCE
EXEMPT ANALYSIS
NOVEMBER 8, 1982
MONROE COUNTY

		PRE-RIF %	VRIF %	IRIF %	TRIF %	POST-RIF %
PERFORMANCE	3 &/OR B	29.8	57.0	80.0	64.3	28.2
	MIXED 3/4	34.2	27.9	15.0	23.8	34.7
	4 & A	36.0	15.1	5.0	11.9	37.1
		100.0	100.0	100.0	100.0	100.0
AGE	39 & B	* 51.2	7.0	*27.5	13.5	53.0
	40-49	* 34.7	34.9	*45.0	38.1	34.5
	50 & A	* 14.1	58.1	*27.5	48.4	12.5
		100.0	100.0	100.0	100.0	100.0
GRADE	9 & B	52.0	20.9	35.0	25.4	53.2
	10-12	33.5	60.5	57.5	59.5	32.3
	13 & A	14.5	18.6	7.5	15.1	14.5
		100.0	100.0	100.0	100.0	100.0

VRIF 86 IRIF 40

ATTACHMENT E

XEROX CONFIDENTIAL

XEROX **Internal Memo**

RECEIVED
SEP 22 1982
D.T. KEARN.

To

D. M. Reid

From

J. J. Foley
Vice President
RMG Personnel
W105 8*222 2376

Subject

CHARLES A. LINDER
--Complaint

Date

September 16, 1982

Charles Linder was a Senior Accounting Analyst in the CMO Control/Planning organization. He is 52 years of age with 14 years of service.

He volunteered for the Voluntary Reduction In Force (VRIF) and left August 27. In his letter, he stated he was energetically advised to accept the VRIF because he was told he was vulnerable. He also felt the "Over 8 Year" rule was being replaced and we should do more for those over 50 years of age.

As you know, RMG has gone through a significant resizing to include a voluntary and involuntary Reduction In Force (RIF). The CMO Control/Planning function has been reduced from 24 to 14 since January 1, 1982. Linder was stack ranked as the lowest exempt within CMO Control and was placed on the initial Involuntary Reduction In Force (IRIF) list. He was told he would be vulnerable because he was in the Grid 2 cell ("3" performer with 14 or less years of service). In light of the depth of our cuts, Linder would have been placed on our final IRIF. Only two other Grid 2 employees were left in CMO C/P; a new college hire and a critical skill.

The VRIF for those who were 51½ years of age with 8 years of service received an additional 3 months and could take ½ pay over time to assist them in bridging to retirement. Since this was an advantage over the IRIF benefits, we did communicate to people the differences and apprised those who we felt were vulnerable. They were told, however, the IRIF list could not be finalized until we had all the VRIF's and until it was approved by both RMG and Corporate senior management.

RECEIVED
SEP 21 1982
D.M. REID

XEROX CONFIDENTIAL

D. M. Reid
Page 2

Linder did choose the VRIP and received 13 months of salary continuation. He has taken ½ pay over 30 months and will bridge to retirement.

You know the review process we went through as well as our sensitivity to age and service combinations; however, this process was not communicated to him. Therefore, we can understand his feeling that the Over 8-Year Rule and our sensitivity to over 50's has changed. It is unfortunate that he as well as others have left either voluntarily or involuntarily; however, the magnitude of our cuts has required it.

I have attached a proposed response to Linder from D. T. Kearns. If you have questions, please let me know.

JJP:epc
attachment

c: C. Christ
F. Pipp

ATTACHMENT F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Letter of Violation

I issue, on behalf of the Commission, the following findings as to the compliance of Xerox Corporation with the Age Discrimination in Employment Act (ADEA), as amended.

The Commission has determined that the Xerox Corporation has discriminated against individuals named, and yet to be named, in violation of Section 4(a) of the ADEA by following employment policies and practices which discriminate against salaried employees and former employees within the protected age group from 40 to 70. These policies and practices include, but are not limited to, selection of employees for termination on the basis of age.

Section 7(b) of the Act requires that before instituting any action the Commission shall attempt to eliminate the discriminatory practices alleged and to effect voluntary compliance with the requirements of the Act through informal methods of conciliation, conference, and persuasion. Section 7(e)(2) of the Act provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with §7(b). The period during which the statute of limitations is tolled, as provided in §7(e)(2), begins upon issuance of this letter.

It is the policy of the Commission to notify the persons aggrieved by the violations which are the subject of this determination of their independent right of action under the ADEA. However, we plan to withhold such action for at least 10 days in order to provide you with an opportunity to discuss this matter further. Carlton Preston, a member of my staff with whom you have already met, will be contacting you shortly to arrange a meeting to begin conciliation.

On behalf of the Commission,

James N Finney
James N. Finney
Associate General Counsel

Date 4/19/84

P. O. Box 1600
Stamford, Connecticut 06904
203 329-8700

Office of General Counsel

EXPRESS MAIL

XEROX

February 20, 1987

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Service
U.S. Equal Employment Opportunity Commission
Washington, D. C. 20507

Dear Mr. Finney:

The short answer to your letter of February 5, 1987 is that Xerox does not accept the terms of conciliation that you propound.

As we have stated time and again, Xerox has no policy of age discrimination and has engaged in no age-discriminatory pattern or practice. For that reason, we cannot agree to a general tolling of the statute of limitations nor can we agree to eradicate policies and practices "which operate to involuntarily terminate protected age group workers."

We recognize the possibility of individual incidences of discrimination given the number of managers that Xerox has and the degree to which operations are decentralized. We have expressed to you since November of 1984 our willingness to investigate individual charges, discuss them with the EEOC, and take individual corrective action where appropriate. At our last meeting, we offered to toll for six months the statute of limitations applicable to these individuals in order to facilitate the prompt resolution of their claims. You have repeatedly refused to take the first step, which is to give us a list of names.

We request one last time the names of these individuals and the opportunity to conciliate their claims. As you are well aware, some of the claims are almost four years old, and if the individuals are truly aggrieved, they have been waiting too long for redress.

I shall save for another day a recital of the many misstatements of fact and mischaracterizations concerning the long history of this proceeding that your letter contains.

Very truly yours,

Christina E. Clayton

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental Health & Safety

CEC/htl

Xerox Corporation
P. O. Box 1600
Stamford, Connecticut 06.
203 329-8700

Office of General Counsel

XEROX

ATTACHMENT G

July 23, 1986

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Services
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Dear Mr. Finney:

I am writing in reply to your letter of July 14, 1986, which we received on July 18, 1986. Your letter and the conclusions that you state the Commission has reached are a surprise to us and, we believe, are inconsistent with what has actually transpired in this matter.

In order to assist in clarifying our position, I believe that it would be helpful to summarize the chronology of prior events:

- In February, 1984, Xerox received from the EEOC a letter of investigation into alleged violations of ADEA. This letter requested voluminous documentary and computer data relating to the calendar years 1980 through 1983.
- In March, 1984, Xerox met with EEOC representatives to clarify the scope of the investigation being undertaken by the EEOC and to reach agreement on the data to be supplied by Xerox.
- In late March and early April, 1984, Xerox began to produce to the EEOC the agreed upon materials, including many documents and the initial set of computer tapes.
- On April 19, 1984, and before Xerox had completed its production of data, the EEOC issued a Letter of Violation under ADEA and started the statutory process of conciliation. While we were somewhat dismayed that the EEOC would issue an LOV before the EEOC had an opportunity to review the data being supplied by Xerox and to listen to our side of the case, we agreed to participate in the conciliation process and to complete the submission of data.
- Throughout the time period between May and August, 1984, there were various written and telephonic contacts between the EEOC and Xerox. Xerox completed its submission of data. There was a meeting to assist the EEOC in analyzing the computer tapes. There was one conciliation meeting at which the EEOC indicated that it had anecdotal evidence relating to the 1980-1983 time period. Xerox asked for information and offered to investigate such individual cases.

RECEIVED

- In September, 1984, a full day meeting was held with EEOC representatives, including yourself, at which Xerox presented information about the personnel activities in question and a statistical analysis of what actually happened. The EEOC presented its preliminary statistical analysis and provided Xerox with one Xerox memorandum about which the EEOC was concerned. This discussion was limited to the years 1980-1983. Subsequent to the meeting, Xerox provided to the EEOC an explanation of the memorandum about which the EEOC had expressed concern.

- Subsequent to the September meeting, the EEOC requested that Xerox provide the names of all persons who participated in voluntary reductions in force in the years 1980-1983. At a meeting in the EEOC's offices in November, 1984, Xerox informed you that we would not provide such names and explained why we took this position. The EEOC at that meeting agreed to provide Xerox promptly with information on approximately 100 cases in which individuals had indicated to the EEOC that they felt age had been a factor in their termination. Xerox agreed to investigate these cases and meet with the EEOC to discuss them. This was the last meeting between Xerox and the EEOC.

- In January, 1985, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. There was no further contact until January, 1986.

- In January, 1986, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. Commission Counsel informed Xerox for the first time that these cases were "outside the Lusardi time frame, that is after March 31, 1983." The Xerox response was that this was a new subject matter which we would have to consider upon receipt of details from the EEOC. There was no further contact until receipt of your letter on July 18, 1986.

Several conclusions flow from the chronology described above:

- Xerox has never been requested to provide data, documentation or to explain its position for the years 1984, 1985 or 1986 and has not been given the opportunity to do so.

- Except for the January, 1986 telephone call, all discussions between Xerox and the EEOC have been limited to the years 1980-1983.

XEROX

The basic point is that, during our conciliation proceedings covering the period 1980-1983, Xerox was never told by the EEOC until the January, 1986, telephone call that the 110 cases to which you now refer actually encompass a "post-Lusardi" time frame. Xerox has repeatedly informed the EEOC that, given sufficient information, it would investigate and address individual claims of terminations presented to it by the EEOC. We are still ready to do so with respect to the new claims you mentioned. I called your office on July 21, 1986, to set-up a meeting and am awaiting your response.

Sincerely yours,

P. Smith

Philip E. Smith
Assistant General Counsel
Personnel and Corporate Affairs

PES/htl

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,)
) Civil Action No.
Plaintiff,)
v.) **COMPLAINT**
THE XEROX CORPORATION, a New York Corporation)
Defendant.)

COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451 and 1345. This is an action authorized and initiated pursuant to 29 U.S.C. 626(b) of the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. 621, et seq. (ADEA) incorporating by reference Sections 16(b) and (c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, et seq.

2. The unlawful employment practices alleged below were and are being committed within the State of New York and the in the Southern Judicial District of New York.

PARTIES

3. Plaintiff Equal Employment Opportunity Commission (EEOC) is the agency of the United States of America charged with the administration, interpretation and enforcement of the Age Discrimination in Employment Act, and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, as ratified by Public Law 98-532, effective October 19, 1984.

4. At all relevant times defendant, the Xerox Corporation and its subsidiaries (Xerox), has continuously been and is now a New York corporation, doing business in the State of New York and is now subject to the provisions of the ADEA.

5. At all relevant times defendant continuously has been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. Sections 630(b), (g) and (h).

6. Prior to the institution of this lawsuit, the EEOC's representatives attempted to eliminate the unlawful employment practices alleged in this complaint, and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. 626(b). All statutory prerequisites to suit have been met.

STATEMENT OF CLAIMS

7. Since April 1, 1983, and continuously up to the present time, the Defendant Xerox Corporation has wilfully engaged in unlawful employment practices in violation of Section 4(a) of the Age Discrimination in Employment Act, 29 U.S.C. 623(a).

8. The Xerox Corporation has followed employment policies and practices which have illegally discriminated against its salaried employees and former employees, aged 40 to 70. The illegal policies and practices implemented by Xerox include, but are not limited to, selecting employees for termination and forced early retirement based on their age.

9. The former employees against whom Xerox has wilfully and illegally discriminated on the basis of age include, but are not limited to: William Albertson, Diego Baca, Francisco Barletta, Sarah Barnes, Joseph Bartell, Robert Barz, Jack Blankenship, James Bovitz, Lean Brady, Richard Bronson, George Brown, Sally Butler, Robert Cameron, Ronald Caselli, Floyd Caskey, Walter Cayeaux, Eraldo Chiecchi, Joseph Cometa, Reynaldo Deary, Anne Drucker, John Flahive, Herman Fleishman, David Fox, Bernard Franck, Jon Freckleton, Diane Goff, John Gosnell, Barbara Gravely, Robert Hall, Merrill Haug, Mary Elizabeth Hunter, William Karlsen, Robert Luchette, Kenneth Mrowiec, Rolando Munoz, Alphonse Oliveri, Tom Ossenford, Patrick Powers, William Previdi, Robert Rankin, John Scafetta, Charles Schubert, Joseph Simonelli, Robert Thompson, John Tortell, Ralph Tuzi, Anthony Vito, William Watkins, and Robert Weiler.

10. The effect of the policies and practices complained of in paragraph 8. above has been to deprive illegally its employees and former employees, including those named in paragraph 10., of equal employment opportunities and otherwise adversely affect their status as employees because of their age.

11. A judgment restraining violations of the ADEA and requiring the retroactive making whole of employees who have suffered as a result of age discrimination is specifically authorized by 29 U.S.C. 626(b) and 29 U.S.C. 217.

PRAYER FOR RELIEF

12. WHEREFORE, The EEOC respectfully prays that this Court:

A. Find that the Xerox Corporation has violated the ADEA following policies and practices which discriminate against its employees in selecting them for termination and forced early retirement on the basis of their age;

B. Grant a permanent injunction restraining Xerox Xerox, its officers, agents, successors, and all persons acting in concert with it, from engaging in any employment practice which discriminates because of age;

C. Order Xerox to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for persons who are forty years of age or more, and which eradicate the effects of its past and present unlawful employment practices;

D. Grant a judgment requiring Xerox to pay appropriate back pay and an equal sum as liquidated damages, in amounts to be proved at trial, to persons adversely affected by the unlawful employment practices described herein, namely the persons listed in paragraph 9. above;

E. Order Xerox to make whole those persons listed in paragraph 9, and all other persons adversely affected by the unlawful employment practices described herein, by making contributions to retirement benefits and insurance benefits, by reinstating employees, and by other appropriate injunctive relief necessary to eradicate the effects of its unlawful employment practices.

F. Grant such other relief which the Court deems proper under the circumstances; and

G. Award the EEOC its costs of this action.

JURY TRIAL DEMAND

The EEOC requests a jury trial on all questions of fact raised by its complaint.

Respectfully submitted,

JOHNNY J. BUTLER
General Counsel (Acting)

JAMES N. FINNEY
Associate General Counsel

LEROY T. JENKINS, JR.
Assistant General Counsel

KAREN H. BAKER
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20507
202/634-6003

DATE

Mr. **Thomas**. Senator, every single presentation memorandum or transmittal memorandum makes its best case. They tend to be advocacy pieces. These memorandums have gotten me into major litigation where I've been taken for a ride, where I've taken a bath. They've gotten the Commission in major litigation where we have been taken for a bath. Okay?

I cannot, nor do I expect each of the other Commissioners to simply accept each one of these memorandums on face value. They are a part of our deliberative process. And I would suspect that if the Commissioners feel that we are going to be grilled on each one of these 700 decisions that it will have a tremendous chilling effect on that deliberative process.

The **Chairman**. And then when did the vote occur?

Mr. **Thomas**. I think sometime subsequent or maybe even before this memorandum.

The vote was subsequent to or during the time period that this was either being written or subsequent to it. But each of the Commissioners had been briefied informally on this during, I think, a period of about a month before that. It was an important case. It was one that I wanted to make sure that each of the Commissioners had time to consider. It came up to us on a very short notice. And it was not one that I was aware of until the very last minute.

Mr. **Shanor**. For the record, Senator Melcher, the memorandum from the Office of General Counsel, which is the two-page transmittal memorandum, is a different document from the 16-page presentation memorandum. It is very likely that the dates are different on those and that the presentation memorandum was before the Commission and it had a chance to look at that in advance of the two-page general counsel memorandum.

You were reading, in other words Senator Melcher, from a document that was probably before the Commission at an earlier time than the time frame you thought.

Incidentally, I might mention that on page 10 of that presentation memorandum there is a statement by the staff people involved saying, we fully expect that during discovery we can obtain similar evidence regarding the post-1983 time period. And that may well have been what the Commission was concerned about. What is that evidence; why do you think it is likely? Those sorts of questions are, of course, entirely within their prerogative.

The **Chairman**. Well first of all, not to get this hearing record today any more confused than it is, the memorandum that I read from is dated March 24th, 1987. You have referred to just now a presentation memorandum which I believe would have been presented on March 16th, is that correct?

Mr. **Shanor**. The Commission was briefed on it orally March 16th and might have had it prior to that time. I do not know.

Mrs. **Silberman**. I may be able to clear this up, Senator.

The memorandum that's dated March 24th, if I remember correctly, that two-page memorandum was indeed dated and sent to us on March 24th. It covered a presentation memorandum which previously had been the basis of the briefing on March 16th. And one of the reasons, at least from my point of view, that the case was voted down was that despite our requests on March 16th that there be an enhancement of the information, none was made available to us.

And then, if I may finish, the actual vote took place by our notation procedures, and I have a piece of paper in my briefing book that says that it was circulated on the 25th, due at the close of business on the 26th, and mine is signed with a note and initial saying that I actually—although it says March 26, that it came back to me and it says, per RGS, 3/27. So it was within that 48 hour period.

The CHAIRMAN. Now, Chairman Thomas, you said that something happened very rapidly. What was that something that happened very rapidly? This is a case that was voted on on March 25th and March 26th, 1987 involving events that occurred in 1984, or prior to 1984.

Mr. THOMAS. No. What I said happened very rapidly, I believe it was in either early March or late February when we were told we were going to get this again. Because I had some concerns about what was going on with this. And I just asked that all the Commissioners be briefed on it, because the request was going to be that we continue to pursue this case by I think, tolling the statute, or something like that I can't remember exactly what it was. But the statute of limitation was about to run out. And the staff—that was the action forcing event. And so it was coming up to us on a very short time frame to consider it before the statute ran out.

That's what I meant by it was on a tight time frame.

The CHAIRMAN. Well, nevertheless, it's exactly what I stated. Evidence was presented by your staff, whether you thought it was good evidence or not, on March 24th, in this 16-page memorandum, that says that there's discrimination—I correct myself—coercion of some of the employees of Xerox forced into voluntary retirement.

Now in addition to that during this period of time, this memorandum happens to say on page 2 that during this entire investigation, Xerox was uncooperative in supplying requested data. "Xerox has consistently maintained that its actions were not discriminatory and has refused to discuss its voluntary reduction in force program during conciliation."

Chairman Thomas, what's the Commission for, if it's not to make sure that you've got all the data in front of you and that you're looking at all this from the standpoint of whether employee's rights have been violated. Isn't that your mandate?

Mr. THOMAS. If the facts were as they were stated in the conclusion, we would have litigated. They were not there.

The CHAIRMAN. Well then you do agree——

Mr. THOMAS. We do not litigate on conclusions.

The CHAIRMAN. Do you agree or not agree that that is exactly what your mandate is?

Mr. THOMAS. We do it. I mean we just spent a million dollars on investigative training despite the budget cuts on the Hill, so as to train our employees to get the facts.

The CHAIRMAN. Chairman Thomas, I said at the outset of this hearing that it wasn't a happy hearing, and it wasn't one that this committee sought at all. It's one that we had to respond to because the complaints we are receiving are so significant that they cannot be ignored by this committee.

The testimony one of today's witnesses does involve this very case. And that's the reason that I have pursued it with these questions. I think that money or no money, the integrity and the very function of the Commission is under question. I, for one, will vote to give you your full request for money, but I'm not satisfied that that's all that's needed.

It just seems that whether you get $165 million or $190 million plus, that you're requesting for the next fiscal year, the real question is whether the Commission in operating in such a way as to protect peoples' rights—in our case we're only looking at the older Americans covered by the statute dealing with age discrimination and employment. I find it a little hard to describe somebody just over 40 years old as an older worker, but nevertheless that's the way the statute describes it.

Mr. THOMAS. Well, Senator, if I may respond to that.

I do consider it a question on my integrity. And I think it's an insult to the Commission as an institution. First of all, the individuals who have all these complaints—the organizations, until we voted the way that we voted on some matters that they were interested in, did not seek to meet with us to discuss any of these issues, did not seek to express concerns directly to us; rather they sued us. They have not sought to work with us. We have always had an open door policy. We do not change cases to suit employers. In fact, there are members of this body who have requested us to talk to some of their employer constituents and all we can promise them is that we will talk to them, without making changes in our decisions. And we've taken a very hard line with employers. When we have the facts, we pursue the cases. And it does do us dishonor, the entire way that this hearing was handled, the accusation and the insinuations. The one thing that I brought into this job that I intend to take away from it is my integrity and my name, and I do not like it attacked.

The CHAIRMAN. There is a record of a declining number of investigations. There's a record of a declining number of cases. That on its face makes anyone wonder.

Mr. THOMAS. I raised those numbers, Senator. I'm the same Chairman who resurrected the agency. We take over 500 cases to court every year. That has never been done in the history of this Commission. We did it without budget increases, without help from this body. We automated that agency when there was no interest in EEOC. We trained when we got no money to train.

Mrs. SILBERMAN. Mr. Chairman, much of the——

The CHAIRMAN. There has been a declining number of cases brought under the——

Mr. SHANOR. That's absolutely wrong, Senator Melcher.

Mrs. SILBERMAN. That's not——

The CHAIRMAN [continuing]. Under the Age Discrimination and Employment Act.

Mr. THOMAS. That's not true, Senator. I'd like to—we have the data.

Mr. SHANOR. We have provided all that data to your staff. That's simply not factually correct.

Mr. THOMAS. Correct the record on the number of cases filed.

Mrs. **Silberman**. Senator, I had planned if I had been allowed, to make my testimony, to ask that we could correct the record on some of both the testimony that's been made this morning and also the information in the memorandum that was transmitted from the staff of the committee which was provided to us this morning.

All of those things are replete with errors which we would like to be able to correct. I also would like to personally comment on the characterization of the Commission's motivation which is questioned in the staff memorandum and to say that I think that I do take my commitment to enforcing this law and it is second to no one in this room or in this country.

The **Chairman**. Based on—I'm not talking about something that somebody's provided to us other than the Commission itself.

Based on the Commission's presentation to us in ADEA recommendations only. Fiscal Year 1986 showed .94 percent of ADEA charges filed were recommended for litigation, and that's down from Fiscal Year 1985. Fiscal Year 1987 shows another decline to indicate——

Mr. **Thomas**. Employers are settling.

The **Chairman** [continuing]. With only 27 days left——

Mr. **Thomas**. Employers are settling.

The **Chairman** [continuing]. It indicates .75 percent——

Mr. **Thomas**. The recommendations program is working. We're collecting $54.7 million, over half the money we collected in our compliance process is ADEA. That's the one area that's working of all the areas.

The **Chairman**. Mr. Chairman, you continually throw up the amount of the money. And I don't dispute the money part of it, but what I'm saying to you, is that your own records show that from Fiscal Year 1985 to Fiscal Year 1986, to Fiscal Year 1987, the recommendations to litigate have gone down.

Mr. **Thomas**. Let me explain this. First of all, it does matter, the number. The people who come to us, our first obligation is to conciliate. If they agree with us, if they give us make whole relief, we can't take them to court. We can't turn it down and say we want to go to court to inflate that number. The higher the number, I would say then that our conciliation process isn't working.

In addition to that, you changed the law. The number of cases that we had in our compliance pipeline included cases, a significant number of cases in the public sector, which was an area, interestingly enough a few years ago, that we were being told we weren't doing enough on. When you did that you pulled the rug out from under that portion of the program. And it will take a year or two to get the replacement numbers back up in order to replace those cases that would have been in litigation this year.

The **Chairman**. I'm not disputing that either. But there's no reason for you, Chairman Thomas, to dispute what your own figures show.

Mr. **Thomas**. Well, let's go back to Fiscal Year 1981. The suits filed in Fiscal Year 1981 at EEOC, the first year EEOC filed suit including the backlog from Labor was 89. 1982, 26, 33, 63, 96, 95.

The **Chairman**. No, no. Chairman Thomas, I'm only referring to those ADEA recommendations.

Mr. **Thomas**. Well, 26 suits filed in 1982, 35, 64, 99, 118 for 1986.

The CHAIRMAN. Now you're talking about suits filed and I'm talking about recommendations for litigation.

Mr. SHANOR. This is Mary Pfeiffer from my staff, who prepared, incidently with overnight work, the statistical responses for materials concerning suits filed, presentation memoranda and the like. I think she can give you a very careful response to that question, Senator.

Ms. PFEIFFER. Senator, the tables that are provided to you as a part of the initial package are answers to very narrow questions, very specific questions raised by your committee in the memo. They do not reflect the entire data base. In certain instances you are only talking about positive recommendations received from the staff in the field, as our interpretation of the question was. It does not reflect the entire data base.

Mr. THOMAS. We do not normally keep the data in this format. This was some of the rush work that we had to do in response to the 58 or 59 questions that were submitted to us on September 3rd.

The CHAIRMAN. Well, nevertheless there——

Mr. THOMAS. But we don't keep data in this format.

The CHAIRMAN. I assume the recommendations to litigate that you've provided us for these fiscal years is correct.

Mr. THOMAS. Her response is that it may be correct, but it's not complete. It only responds to the questions you asked, and not the data that we keep.

The CHAIRMAN. Well, nevertheless I have to assume that what you submit to us on recommendations to litigate under the ADEA is accurate.

Mr. THOMAS. It's really interesting. The recommendations go up primarily because we clean the process out and we bring the cases in from the field. And the same people who increased all the recommendations and the litigation are being now accused of not enforcing the law. That's a curious conflict.

Mr. SHANOR. Particularly curious, Senator, in light of the fact that between 1982 the total recommendations were 60 and 1986, 181 notwithstanding the fact that Congress cut out a whole class of ADEA class cases, namely the public sector BFOQ cases toward the end of 1986.

Mrs. SILBERMAN. And those cases were cases that were specifically taken out of that recommendation pipeline purposefully, both from the standpoint of management and the standpoint of the law that Congress passed.

The CHAIRMAN. Well, am I correct? You're not refuting these figures that are presented for recommendations to litigate.

Mr. THOMAS. We're not refuting. What we're trying to tell you is this. We were trying to be honest with the numbers. We could have inflated those recommendations simply by allowing district offices to do something that they had done in the past. That was go and sue every little municipality in the United States, just to get a recommendation. I took the position, the Commission took the position, that that is not—we're not in the numbers game. We're in the business of trying to enforce the law, to make sure that we've got the statutory changes in States like Indiana, Pennsylvania, California, rather than suing every little municipality to get numbers. We could have inflated those numbers. I don't play that game.

Mr. **Shanor**. Your Honor, just to give you a feel for how that can operate perversely in my estimation, if you have three individuals who make similar claims, we consolidate them and file one law suit, not three separate suits. And it strikes me as being very perverse to do that the other way, simply to increase the number of lawsuits.

The **Chairman**. Well, there's one final point.

You have a systemic division which is the group, I understand, that recommends for a type of class action suit, is that correct?

Mr. **Thomas**. The systematic division recommends some systemic cases. Class action suits come from the field.

The **Chairman**. From the field.

Mr. **Thomas**. As well as some from the systematic division. But the major source is from the field, predominantly.

The **Chairman**. Well, has that systemic division filed a direct suit in recent years?

Mr. **Thomas**. That is one of the reasons why it's back in the field. If you notice over the 5 years there's been a decentralization of the whole systemic process. There was a national litigation plan before in that kind of an effort. The last major one of those cases—well there were two during my tenure. One was the General Motors case that we settled in 1983, I believe. The other was the Sears case which we were involved in major litigation with. But by and large, and I'll let the general counsel answer about the litigation unit of that, we have a very active compliance side systemic program. It's more active now than it's ever been. From a litigation standpoint, our strategy is to move back to the field areas where we do have, in most instances, the lawyers who are very experienced, and have them try those cases.

Mr. **Shanor**. To give you a sense, Senator, of how decentralization affects the litigation work of the Commission, we have five cases going to trial in the San Francisco Office alone in the next 6 weeks. We have a huge number of class action cases being litigated and tried out of our Chicago Office which we have provided with close to a million dollars worth of litigation support funds for class action cases simply in this last fiscal year. So we are doing a large number of class litigation cases, but we tend to be doing them from the field rather than from Washington, because that is much more cost effective. We do them where we are close to the corporate headquarters, the documents that we will have to look at. The travel expenses will be much lower. We try, in essence, to litigate our cases from the area of the country in which the suit will be filed and where the documents are present. That's why we are doing those cases in a decentralized fashion.

The **Chairman**. All right.

Thank you all very much. The hearing record will be kept open for 14 days.

Mrs. **Silberman**. May I ask that my testimony be made part of the record, my oral testimony.

The **Chairman**. Yes, your testimony will be made part of the record.

Mrs. **Silberman**. Thank you.

[The prepared statement of Mrs. Silberman follows:]

TESTIMONY OF

R. GAULL SILBERMAN
VICE CHAIRMAN
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPRECIATE THE OPPORTUNITY TO DISCUSS SOME OF THE ISSUES INVOLVED IN THE EEOC'S ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT. CHAIRMAN MELCHER'S LETTER OF AUGUST 19 ASKED THAT WE ADDRESS SPECIFIC ISSUES: THE EEOC'S EFFICIENCY AND EFFECTIVENESS IN HANDLING AGE DISCRIMINATION COMPLAINTS; OUR RATIONALE AND JUSTIFICATION FOR ADOPTING A RULE TO PERMIT KNOWING AND VOLUNTARY WAIVERS AND SETTLEMENTS OF ADEA RIGHTS WITHOUT GOVERNMENT SUPERVISION AND APPROVAL; AND THE EEOC'S RECENT DECISION TO RETAIN A LONG-STANDING INTERPRETATION THAT BONA FIDE APPRENTICESHIP PROGRAMS ARE NOT COVERED BY THE ADEA.

YESTERDAY I NOTICED THAT THESE HEARINGS HAD A TITLE, THAT IS: "THE TWENTY YEAR RECORD OF ADEA: SUCCESS OR FAILURE?" WHILE I CANNOT SPEAK AUTHORITATIVELY ABOUT THE FIRST TWELVE YEARS OF THE AGE ACT WHEN IT WAS ENFORCED BY THE DEPARTMENT OF LABOR, I CAN TELL YOU THAT SINCE ASSUMING RESPONSIBILITY FOR THE ACT IN 1979, THE EEOC HAS FILED MORE AGE LAWSUITS, RECOVERED MORE BACK PAY FOR VICTIMS OF DISCRIMINATION, AND RESOLVED MORE CHARGES THAN AT ANY OTHER TIME.

IN 1979, THE EEOC ASSUMED JURISDICTION OVER THE AGE ACT AT A CRITICAL TIME, A TIME WHEN NUMBERS OF CHARGES WERE MOUNTING --ACROSS THE BOARD -- AND THE COMMISSION'S ABILITY TO DEAL WITH THIS CASE LOAD WAS IN DOUBT. IN 1982 WHEN CHAIRMAN THOMAS ARRIVED, THE COMMISSION WAS UNDER PRESSURE TO TAKE THE EASY ROUTE OF REMAINING MERELY A "CLAIMS ADJUSTMENT" AGENCY. INSTEAD THIS COMMISSION DETERMINED TO BECOME AN EFFECTIVE, CREDIBLE LAW ENFORCEMENT AGENCY. WE ADOPTED POLICIES FUNDAMENTAL TO ESTABLISHING THE EEOC AS A CREDIBLE DETERRENT TO DISCRIMINATION, POLICIES INTENDED TO ENSURE THAT THE EEOC BRINGS ITS FULL RESOURCES TO BEAR ON BEHALF OF EACH AND EVERY VICTIM OF DISCRIMINATION. (AS DETAILED IN OUR WRITTEN TESTIMONY.) THESE CHANGES ACCOUNT IN LARGE PART FOR THE EEOC'S IMPRESSIVE LITIGATION RECORD UNDER THE ADEA IN RECENT YEARS, AND HAVE TRANSLATED INTO MORE MEANINGFUL, PROMPT RELIEF FOR MORE VICTIMS OF AGE DISCRIMINATION.

MOREOVER, ANY DOUBTS IN 1979 THAT AGE CASES WOULD TAKE A BACKSEAT TO THE EEOC'S TITLE VII RESPONSIBILITIES HAVE BEEN CONCLUSIVELY LAID TO REST BY OUR ENFORCEMENT STATISTICS. INDEED, WE BELIEVE THE AGE ACT HAS BENEFITTED FROM BEING ENFORCED IN TANDEM WITH TITLE VII. AGGRIEVED EMPLOYEES CAN FILE ONE CHARGE ALLEGING CLAIMS OF DISCRIMINATION ON MULTIPLE BASES. MOREOVER, OUR INVESTIGATORS ARE ALERT TO IDENTIFYING POTENTIAL VIOLATIONS OF AGE ACT RIGHTS OF WHICH A CHARGING PARTY MIGHT BE UNAWARE. OUR INVESTIGATORS ALSO KNOW THAT INDIVIDUAL CHARGES OFTEN LEAD TO CLASS CASES WHICH WE VIGOROUSLY PURSUE. THE STATISTICS ON OUR ENFORCEMENT ACTIVITIES HAVE BEEN SUMMARIZED BY CHAIRMAN THOMAS AND ARE FULLY DETAILED IN OUR PREPARED TESTIMONY. THIS RECORD SPEAKS FOR ITSELF AS PROOF OF THIS COMMISSION'S SUCCESS IN AGGRESSIVELY PROSECUTING CLAIMS OF AGE DISCRIMINATION ON AN INDIVIDUAL, CLASS AND SYSTEMIC BASIS.

LET ME NOW TURN TO OUR RULEMAKING ACTIVITIES. THE AGE ACT GIVES THE EEOC SUBSTANTIVE RULEMAKING AUTHORITY. USE OF THAT AUTHORITY HAS ADVANTAGES BOTH FOR THE AGENCY AND THE PUBLIC WE SERVE: IT PROVIDES AN OPPORTUNITY FOR PUBLIC COMMENT FROM ALL INTERESTED PARTIES ON COMPLEX POLICY ISSUES WHERE CASE-BY-CASE LITIGATION IS LESS EFFICIENT OR EFFECTIVE. FOR THESE REASONS, I WOULD LIKE TO SEE US EXERCISE THAT AUTHORITY MORE OFTEN.

OUR RECENT RULEMAKING ON WAIVERS IS A CASE IN POINT. THAT RULEMAKING ~~WAS~~ PROMPTED BY THE UNCERTAINTY SURROUNDING A COURT DECISION HOLDING THAT, BECAUSE OF THE INCORPORATION OF THE ENFORCEMENT MECHANISM OF THE FLSA INTO THE ADEA, ALL WAIVERS UNDER THE AGE ACT MUST HAVE THE PRIOR SUPERVISION AND APPROVAL OF THE EEOC IN ORDER TO BE VALID. THE COMMISSION DECIDED IT WAS IN THE PUBLIC INTEREST TO ISSUE AN EXEMPTION TO ALLOW UNSUPERVISED WAIVERS. SUCH AN EXEMPTION IS FULLY CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ADEA, WHICH EMPHASIZES THE IMPORTANCE TO OLDER WORKERS OF VOLUNTARY SETTLEMENTS AND EXPEDITIOUS RESOLUTION OF DISPUTES. FOLLOWING THE ISSUANCE OF OUR NPRM, THE COMMISSION'S INTERPRETATION HAS BEEN ENDORSED BY FOUR CIRCUIT COURTS OF APPEALS AND WE BELIEVE THE EXEMPTION WILL REMOVE ANY REMAINING CONTROVERSY OVER THIS ISSUE.

REQUIRING BUREAUCRATIC OVERSIGHT OF SETTLEMENTS IN THOSE CASES WHERE BOTH PARTIES ARE AGREED WOULD, IN OUR OPINION, SERIOUSLY INFRINGE UPON THE RIGHTS OF OLDER WORKERS TO OBTAIN BENEFITS EXPEDITIOUSLY, PERHAPS AT ALL. WITHOUT THIS RULEMAKING OUR RESOURCES COULD HAVE BEEN CONSUMED BY OVERSEEING ALL PRIVATE ADEA SETTLEMENTS, EVEN IN THE VAST MAJORITY OF CASES WHERE THE PARTIES ARE MUTUALLY SATISFIED AND HAVE NO DESIRE OR NEED FOR GOVERNMENT INVOLVEMENT AND ITS INEVITABLE ATTENDANT DELAYS. MOREOVER, IT WOULD MAKE IT WELL NIGH IMPOSSIBLE TO DEVOTE SUFFICIENT COMMISSION RESOURCES TO ENFORCING THE RIGHTS OF THOSE WHO HAVE BEEN DISCRIMINATED AGAINST AND COME TO US FOR HELP.

IT IS IMPORTANT TO REALIZE THAT THE RULE SIMPLY CLARIFIES THE STATUS QUO AND SUBJECTS AGE WAIVERS TO THE SAME LEGAL STANDARDS AS THOSE UNDER TITLE VII: PRIVATE UNSUPERVISED WAIVERS OR SETTLEMENTS OF AGE RIGHTS ARE VALID ONLY WHEN THEY ARE KNOWING AND VOLUNTARY. THE FINAL RULE CONTAINS GUIDELINES AND SAFEGUARDS TO ENSURE THAT OLDER WORKERS WILL NOT BE COERCED INTO INVOLUNTARY OR UNKNOWING WAIVERS OF THEIR RIGHTS. THE EEOC STANDS READY TO ASSIST ANY PERSON WHO WOULD PREFER TO HAVE THE GOVERNMENT OVERSEE HIS OR HER SETTLEMENT, AND MOST ASSUREDLY WE WILL ACT PROMPTLY TO SET ASIDE ANY RELEASE PROCURED BY COERCION OR FRAUD. TO THAT END, THE RULE PROVIDES THAT A WAIVER CANNOT, UNDER ANY CIRCUMSTANCES, PREVENT AN INDIVIDUAL FROM FILING A CHARGE WITH THE EEOC. WE BELIEVE THAT THE FINAL RULE THUS LEAVES OLDER WORKERS FREE TO ~~ACT~~ make an informed judgment, IN THEIR OWN ~~SELF~~ INTEREST, WITHOUT MANDATORY GOVERNMENT INTERFERENCE AND DELAY, AND PRESERVES THE GOVERNMENT'S ABILITY -- AND RESOURCES -- TO INTERVENE WHEREVER NECESSARY TO FIGHT AGE DISCRIMINATION.

NOW IF I MAY TURN TO THE FINAL SPECIFIC QUESTION POSED IN THE CHAIRMAN'S LETTER. THE QUESTION OF AGE LIMITS IN APPRENTICESHIP PROGRAMS PRESENTS A DIFFICULT POLICY JUDGMENT INVOLVING THE BALANCING OF MANY COMPETING INTERESTS. BUT THE COMMISSION'S PROPER ROLE IS, FIRST AND FOREMOST, TO FOLLOW THE INTENT OF CONGRESS. ON THIS QUESTION WE FOUND THE LANGUAGE OF THE AGE ACT, ITS LEGISLATIVE HISTORY AND THAT OF RELATED LAWS PROVIDED CONVINCING EVIDENCE THAT APPRENTICESHIP PROGRAMS

WERE NOT INTENDED TO BE SUBJECT TO THE ACT. THE ADEA, IN NOTABLE CONTRAST TO TITLE VII, WHICH IT OTHERWISE TRACKS SUBSTANTIALLY IN ITS SUBSTANTIVE PROVISIONS, CONTAINS NO EXPRESS PROHIBITION OF DISCRIMINATION IN APPRENTICESHIP. THE DEPARTMENT OF LABOR DRAFTED THE AGE ACT IN THIS WAY AFTER HAVING ADMINISTERED FOR MANY YEARS APPRENTICESHIP PROGRAMS WITH AGE LIMITS ON ENTRY. SHORTLY AFTER ENACTMENT OF THE ADEA, THE DEPARTMENT OF LABOR ISSUED THE INTERPRETATION THE COMMISSION HAS NOW VOTED TO LEAVE IN PLACE, AND CONTINUED TO REGISTER PROGRAMS WITH AGE LIMITS UNDER THE NATIONAL APPRENTICESHIP ACT. OVER THE YEARS, CONGRESS PRESUMABLY HAS BEEN AWARE OF THIS INTERPRETATION YET HAS NOT ACTED TO REVERSE IT. EXPRESS EFFORTS TO AMEND THE NATIONAL APPRENTICESHIP ACT TO PROHIBIT AGE LIMITS HAVE NOT BEEN SUCCESSFUL. THE COMMISSION THUS CONCLUDED THAT ANY CHANGE IN THE STATUS QUO IN REGARD TO APPRENTICESHIP IS A POLICY DETERMINATION PROPERLY LEFT TO CONGRESS.

MR. CHAIRMAN LET ME CLOSE BY SAYING THAT THE CHAIRMAN AND I DO WELCOME THE OPPORTUNITY TO BETTER INFORM THE CONGRESS OF THE ENORMOUS JOB THAT NEEDS TO BE DONE AND THE DETERMINATIONS THAT WE HAVE MADE ON HOW THAT JOB CAN BEST BE DONE. ON SOME OF THESE ISSUES DIFFERENCES WILL ARISE BETWEEN "REASONABLE MEN AND WOMEN". BUT AS TO OUR BASIC PURPOSE AND RESPONSIBILITY, THERE CAN BE NO DIFFERENCES. IN THE ADEA, CONGRESS HAS DECLARED THESE TO BE:

(1) PROMOTING THE EMPLOYMENT OF OLDER PERSONS BASED ON ABILITY RATHER THAN AGE

(2) PROHIBITING ARBITRARY AGE DISCRIMINATION IN THEIR EMPLOYMENT AND

(3) HELPING EMPLOYERS AND OLDER WORKERS TO FIND WAYS OF MEETING PROBLEMS ARISING FROM THE IMPACT OF AGE ON EMPLOYMENT.

THE TASK IS HERCULEAN AND WE APRRECIATE AND CONTINUE TO NEED THE SUPPORT OF THIS COMMITTEE IN ORDER TO FULFILL THE COMMITMENT THAT I KNOW WE ALL SHARE.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E STREET, NW • WASHINGTON, DC 20507

R. GAULL SILBERMAN

VICE CHAIRMAN

Rosalie Gaull Silberman was designated vice chairman of the U.S. Equal Employment Opportunity Commission on Nov. 19, 1986, by President Ronald Reagan. Nominated by President Reagan on Nov. 27, 1984, as a recess appointee, Silberman was sworn in to a full five-year term by Supreme Court Justice Sandra Day O'Connor on July 8, 1985.

Vice Chairman Silberman graduated from Smith College, Northampton, Mass., with a bachelor of arts degree in government. She began her career as a teacher in Hawaii and in Maryland. Her achievements were recognized by President Richard M. Nixon in 1974 when he appointed her to the National Advisory Council on the Education of Disadvantaged Children. There she chaired the committee on legislation and was co-chairman of the committee on evaluation.

She was elected to head the board of Widening Horizons, a volunteer organization that worked closely with the District of Columbia Board of Education to promote career planning programs for inner city students.

Vice Chairman Silberman spent two years in Belgrade, Yugoslavia, when her husband was United States ambassador in 1975. During that period, she assumed an active role in planning and executing activities at the embassy and acquired a working fluency in Serbo-Croatian.

After returning from Yugoslavia, Vice Chairman Silberman served as consultant to the National Republican Senatorial Committee and organized and directed the Tidewater Conferences. In 1978, she became press secretary and director of communications for Sen. Bob Packwood, R-Ore. From 1980 through 1982, the Vice Chairman served as a consultant to Sen. Packwood and was director of public relations for the San Francisco Conservatory of Music. In 1983, Silberman was named special assistant to Commissioner Mimi Weyforth Dawson of the Federal Communications Commission.

She is married to Judge Laurence H. Silberman, U.S. Circuit Court of Appeals for the District of Columbia. The vice chairman and her husband have three children: Robert, Kate Balaban and Anne.

The **Chairman**. The committee is adjourned.

[Whereupon, at 2:30 p.m., the committee was adjourned.]

APPENDIXES

APPENDIX I.

CHRONOLOGY OF ADEA POLICY DEVELOPMENT BY EEOC: EARLY RETIREMENT PROGRAMS--VOLUNTARY/INVOLUNTARY

Prepared By Staff
of the
Special Committee on Aging, U.S. Senate

1964	Executive Order No. 11141 specifically declared a public policy against age discrimination in employment. "[E]qual employment opportunity is now an established policy of our Government*** [D]iscrimination in employment because of age, *** is inconsistent with the principle and with the social and economic objectives of our society."
1967	Congress passes the Age Discrimination in Employment Act (ADEA), enacting a mandate that no person up to the age of 65 be presumed incompetent based solely upon age. The purpose of the Act was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment***" The Act makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."
1979	Congress approves President Carter's Reorganization Plan No. 1 of 1978, transferring from the Department of Labor to EEOC responsibility for enforcing and administering the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA).
9/17/82	***MEMO** to Michael Middleton, Office of General Counsel (OGC), EEOC, from Paul Brenner, OGC Trial Services, EEOC. RE: Review of PM from the N.Y. Dist. Office--Monroe Community College & Faculty Assoc. of Monroe Com. College. This case involved a charged filed on 3/17/80, alleging age discrimination due to respondents' age-based retirement incentive plan, which was negotiated with the union. The plan covered the years Sept. 1979 thru July 1982. The lump sum payment made to voluntary retirees varied upward according to years of service and downward according to age (55-62 years of age). During that period, several retirees (over age 62) received no benefits. Brenner stated in his memo: "I concur in part to litigate this novel and potentially controversial ADEA case***. Specifically, I concur in the recommendation to seek an injunction against continuation of the alleged unlawful practice. *** Except for a one-time opportunity, when the plan was started in 1979, faculty members over age 62 do not receive any retirement bonus. It is thus evident that identically situated employees receive a reduced bonus, or no bonus whatsoever, solely on the basis of age. *** I would view Respondents's plan as unlawful unless it qualifies as an exempt "employee benefit plan" within the meaning of ADEA SEction 4(f)(2). However, as that phrase is defined in 29 CFR 860.120(a), the plan cannot qualify because the benefit reductions are not justifiable on the basis of actuarial cost considerations. [NOTE: HAND-WRITTEN NOTATION AT TOP OF PAGE 1: "REJECTED BY GC 12/1/82"]
3/8/83	*Lusardi v. Xerox*, a class action suit alleging company-wide age discrimination by Xerox, was filed in U.S. District Court in New Jersey.

5/9/83 ***MEMO** to Michael Middleton, OGC, EEOC, from Paul Brenner, OGC Trial Services, EEOC. RE: Review of PM from the N.Y. Dist. Office--[Cipriano v.] North Tonawanda Bd. of Education, et al. Cipriano involved a retirement incentive plan instituted in Jan. 1979 and extending to 9/30/79. During that period, all retirement-eligible employees (at least 55 years old and at least 20 years of service) could participate. Following that period, participation was limited to employees who were age 55, but not over 60, thereby excluding employees aged 61 thru 69. The N.Y. Dist. Office proposed in its PM to file an action requiring respondents to permit retirement-eligible employees aged 61-69 to participate in the incentive plan and to recover monetary damages for at least five aggrieved individuals. Brenner stated in his memo: "*** I agree that the retirement incentive plan violates Section 4(a)(2) of the ADEA, because of the age-based exclusion of otherwise eligible employees. I also agree that the plan is not exempt by virtue of the Sec. 4(f)(2) exception for employee benefit plans, since there is no apparent actuarial justification for the age-based exclusion. *** Although I concur in the recommendation to litigate***, the following should be noted: (1) There is no ADEA caselaw on the legality of retirement incentive plans; (2) The Commission has not yet taken any position on the legality of such plans; (3) SCEP is now considering ADEA interpretative guidelines, in the form of proposed questions-and-answers, dealing with such plans. [NOTE: HAND-WRITTEN NOTATION, DATED 5/10/83, AT TOP OF PAGE ONE--"I CONCUR IN THE RECOMMENDATION TO LITIGATE. THE WINDOW DURING WHICH AN EMPLOYEE MAY RETIRE MAY PROVE TO BE TROUBLESOME, BUT SINCE THE Q & A's ON EARLY RETIREMENT ARE APPARENTLY GOING NOWHERE, WE MIGHT AS WELL LEAD IT PROPOSING LITIGATION." INITIALED, "DW," FOR DANIEL WILLIAMS, JR.; ALSO, SEE 6/21/84 MEMO BELOW WHICH CONTAINS A REFERENCE TO CIPRIANO.]

AUG. 1983 Systemic Programs, OGC, EEOC, learned of Lusardi v. Xerox, a private class action lawsuit filed in New Jersey on 3/8/83 (see 8/8/84 memo to Cynthia Matthews from Leroy Jenkins, Jr., EEOC)

11/10/83 **MEMO** to Odessa Shannon, Director, Office of Program Operations, EEOC, from James Finney, Director, Systemic Programs. RE: Designation of Authority to initiate age discrimination investigations. "*** It is requested *** that the Director of Systemic Programs be designated to initiate an investigation of the Xerox Corporation, and future ADEA investigations of matters coming to the attention of Systemic Programs.

11/10/83 **MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Carlton Preston, atty, EEOC, and Judy Mathis, atty, EEOC, re: Recommendations for Action in Xerox Case. "We recommend that the Commission initiate an investigation with the goal of filing a direct suit against Xerox***[W]ithout the expertise and resources of the Commission the private plaintiffs' ability to aggressively represent the remaining 4000 potential plaintiffs is doubtful.***[T]he company has so far vigorously resisted discovery.***Systemic Programs should***request that all open age charges against Xerox be sent from the field.***Xerox has conducted several reductions in force***since May 1980.***Criteria for termination***are clearly non-objective and arbitrary.***[T]he original named plaintiffs were summarily fired and were replaced by people who were younger and whose sales records were poorer than plaintiffs'. Xerox has not followed its announced procedures in conducting reductions in force and its announced criteria for selection,***appear to be subjective and not job related."

1/12/84 **MEMO** to Clarence Thomas, Chairman, EEOC, from James Finney, Assoc. Gen. Counsel, EEOC, re: Designation of Authority to Initiate Age Discrimination and Equal Pay Investigations. "Earlier this year Systemic Programs put in place systems to monitor private litigation***for possible intervention or direct suits***[M]any private lawsuits and Commission charges alleging violations of the [ADEA] on a classwide basis have been discovered.***It is essential that investigations of possible violations and development of litigation against large national employers be directed and conducted by Systemic Programs***Systemic Programs is required***to develop ADEA litigation."

2/7/84 **MEMO** to James Finney, Assoc. Gen Counsel, EEOC, from Odessa Shannon, Director, Office of Program Operations. RE: Delegation of Authority to Initiate Direct Investigation of Xerox Corp.

2/7/84 **LETTER** to Douglas Reid, Vice President, Personnel, Xerox Corporation, from James Finney, Associate General Counsel, EEOC, advising Xerox that "the Commission is initiating an investigation of the Xerox Corporation," and requesting information and computerized data on Xerox employees and former employees.

2/22/84 **MEMO** to District and Area Directors, EEOC, from James Finney, Assoc. Gen. Counsel, EEOC, re: Age Charges Against Xerox Corporation. "We request that your office***collect all open charges and mail copies to Systemic Programs***Stay any further settlement, conciliation, issuance of conciliation failure letters or other administrative closure for any of these charges, pending clearance from Systemic Programs."

3/13/84 **MEETING** (the first) between EEOC and Xerox. Despite requests from EEOC staff, Xerox representative did not bring computer tapes of employee information or a computer expert to analyze such data. [SEE MEMO OF 4/18/85.] [see 8/1/84 letter to Xerox]. NOTE: GET MINUTES OF MEETING.

MAR. 16 **XEROX** delivered to the EEOC during this week the first of three submissions of computer tapes. However, the code documentation was not included. [SEE MEMO OF 4/18/85].

4/13/84 **MEMO** to James Finney, Associate General Counsel, EEOC, from Carlton Preston, Senior Trial Attorney, EEOC. The memo discusses EEOC's findings that Xerox: (1) hired many people since 1980 and almost none were over age 40; (2) hired more people than were terminated (3) management had circulated a memorandum announcing a strategy of getting rid of "senior professionals".

APR 1984 **XEROX** submitted the second set of computer tapes to EEOC staff. [SEE MEMO OF 4/18/85.]

4/16/84 **MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Carlton Preston, atty, EEOC, RE: Request for issuance of letter of violation based upon evidence obtained by the Commission. [NOTE: EEOC attys by this time were working and sharing information with the Lusardi attys.]

4/19/84 **LETTER OF VIOLATION (LOV)** was issued by EEOC to Xerox for alleged violation of ADEA. "The Commission has determined that the Xerox Corporation has discriminated***in violation of*** ADEA."

4/30/84 **LETTER** to James Finney, Assoc. Gen. Counsel, EEOC, from Philip Smith, Assoc. Gen. Counsel, Xerox, re: EEOC Investigation. "We consider EEOC's action to be capricious***Xerox denies it has violated the ADEA."

5/11/84 **MEMO** to Xerox file, from Judy Mathis, atty, EEOC, re: Summary of Hearing in U.S. District Court, May 2, 1984, Lusardi v. Xerox. "***Xerox asked to meet with Judge Stern to inform him that the EEOC Letter of Violation had been received and to ask his permission to keep its contents secret until after the May 9th deadline for plaintiffs to opt into the private [Lusardi] suit.***The judge directed Xerox to give [plaintiffs attorney]

Jaffe a copy of the letter and strongly implied to Jaffe that it is his duty to see that plaintiffs and potential plaintiffs have this information. [The judge] told Xerox they can say whatever they want about the letter except that they 'will pay' if they make misleading statements."

5/23/84 **MEETING** (the second time representatives from both parties met, but the first conciliation meeting pursuant to ADEA.) between EEOC and Xerox. Xerox denied any violation of the ADEA, and assured the EEOC that the second set of tapes were complete. [SEE MEMO OF 4/18/85].

6/21/84 ***MEMO** to Michael Middleton, Associate Gen. Counsel, OGC, EEOC, from Paul Brenner, OGC Trial Services, EEOC. RE: Review of PM--Natick [Mass.] School Committee, & Education Association of Natick. This case involved exclusion from a retirement incentive plan teachers aged 62 and older. Brenner stated in his memo: "I recommend against litigating this ADEA case *** until such time as the Commission formulates an enforcement policy on early retirement incentive plans. *** The Commission has not yet taken any position on the application of the ADEA to retirement incentive plans, although the entire matter is under continuing study by the Office of Legal Counsel and SCEP. Therefore, until such time as the Commission does adopt an enforcement policy***, it would be inappropriate to consider this case for litigation. See e.g., attached memorandum, Middleton to Williams, Feb. 10, 1984, re North Tonawanda Board of Education [v. Cipriano] in which OGC/Trial declined to recommend that the Commission litigate a similar case involving an early retirement incentive plan." [NOTE: THE 2/10/87 MEMO CITED ABOVE MUST BE OBTAINED; ALSO, SEE 5/9/83 MEMO ABOVE; ALSO, SEE 6/25/84 MEMO BELOW.]

6/25/84 ***MEMO** to Robert Williams, Regional Atty., N.Y. Dist. Office, EEOC, from Michael Middleton, Associate Gen. Counsel, Trial Services Divisions, OGC, EEOC. RE: Mitro v. Natick School Committee & Natick Education Association Charge Nos. 011-82-0822 & -1041. "For reasons stated in the attached [6/21/84] staff review memorandum, this *** case is being returned without approval or rejection of your litigation request, in order to await the Commission's adoption of an enforcement policy regarding early retirement incentive plans. [NOTE: SEE 6/21/84 MEMO ABOVE.]

7/20/87 ***MEMO** to Michael Middleton, Associate Gen. Counsel, Trial Services, OGC, EEOC, from Johnny **Butler**, Gen. Counsel (Acting), EEOC. RE: Early Retirement Cases that Former General Counsel Rejected. "At the SCIP/SCEP meeting this week, it was revealed that the former General Counsel had rejected some early retirement cases which had been sent to him for litigation recommendation. Chairman **Thomas** and Commissioners Webb and Gallegos request that those cases be placed on the Commission agenda***". [NOTE: OBTAIN IDENTIFICATION OF THE CASES REJECTED BY GENERAL COUNSEL.]

7/20/84 **MEETING** (the third) between EEOC staff and Xerox. At this meeting, Xerox produced its computer expert who created the tapes, Tom Stone. "After talking to Mr. Stone we learned for the first time that the documentation we received with the tapes was meaningless***" [SEE MEMO OF 4/18/85].

LATE JULY **MEMO** to the Commissioners from James Finney, Assoc. Gen. Counsel, EEOC. RE: Request for approval for funding of Expert's Services Contract in EEOC V. Xerox. "*** [T]he chances of successful conciliation are slim. While we continue to hope that we can resolve this apparent violation of the ADEA short of litigation, we must be ready to move quickly to prosecute a lawsuit***. [W]e expect to make the decision that conciliation has failed within thirty days. *** Xerox has *** failed to give us data that is meaningful data, has misrepresented the meaning of data given, and has deliberately misled us concerning documentation of computer files.

7/31/84 **MEMO** to Judy Mathis, EEOC atty, from Donald Reisler, DBS Corp. (consultant to EEOC on Xerox) RE: Summary of 7/25/84 mtg. with Xerox. "*** Unfortunately, the [computer tapes] documentation which was previously received was shown to be misleading, inaccurate, and generally wrong.***We have serious problems with the [computer] tapes and our conclusions will be of limited power."

8/1/84 **LETTER** to Philip Smith, Assoc. Gen. Counsel, Xerox, from Carlton L. Preston, Atty, EEOC. "***Xerox has asserted that all necessary documentation has been provided. We learned from [Xerox's] Mr. Stone for the first time on July 25, 1984 that the job codes and organization codes lack sufficient meaning.***We have spent considerable time, effort, and money in an attempt to read and analyze the Xerox computer tapes which Xerox has represented as showing that the company has not violated the ADEA. However, after attempting to do so we now find that the company has misrepresented from the beginning the kind of information provided.***"

8/8/84 **MEMO** to Cynthia Matthews, Special Assistant to the Chairman, from Leroy Jenkins, Assistant General Counsel, EEOC, RE: investigation of allegations of age discrimination against the Xerox Corporation. "As we pursued this matter, we found increasing evidence to support the claims made by plaintiffs in Lusardi v. Xerox, particularly in regard to terminations of salaried professional and sales employees. After considering the merits of intervening in Lusardi v. Xerox, we decided for many reasons that proceeding with our own investigation and filing a direct lawsuit, should that step be warranted, would be a more desirable course to follow. From September 1983 through January 1984, we continued to interview charging parties and plaintiffs, we reviewed data received by the private plaintiffs in discovery, and reviewed information submitted by Xerox to district offices during investigations of previous charges. Analysis of data and interviews continued to add further evidence supporting the allegations of age discrimination by Xerox.***[Xerox's computer expert] revealed to us that the original data had been misrepresented and that he had known from the beginning that some of the data submitted are misleading or useless.***"

8/10/84 **MEMO** to Leroy Jenkins, Ass't. Gen. Counsel, EEOC, from Unknown, RE: evidence obtained and analyzed prior to LOV. "Evidence showed*** many younger employees with fewer sales were retained while Charging Parties (CP's) were terminated***CP's all had history of high sales and successful careers with Xerox***" EEOC staff performed 25 interviews with former Xerox employees. "All gave statements which show a pattern: all were either called in suddenly and told they were terminated effective immediately or were told by their supervisor that if they did not voluntarily resign or retire that they would be fired." "Evidence shows that during the period Xerox hired more salaried employees than were terminated. Xerox reason for terminations, necessary reduction in force, is at least in part pretextual as many were being replaced." This memo additionally summarizes evidence obtained and analyzed subsequent to the issuance of the LOV by the Commission. "Partial analysis of (personnel files of charging parties) confirms oral statements by charging parties already interviewed***Interviews with charging parties/Lusardi plaintiffs have provided confirmation of many initial interview allegations***[B]ecause so many former employees, from around the country and from different jobs and different divisions, say much the same things about the circumstances of their terminations or retirements, the evidence of a pattern and of a deliberate, corporate directed policy grows stronger***The difficulties with reading the (computer tapes from Xerox) and

	drawing meaningful data from them have been extensively documented elsewhere. Because Xerox has represented that these tapes will vindicate its assertions*** we have taken the deliberate attempts to mislead us and the false statements as to the documentation provided to be evidence of lack of good faith in conciliation negotiations***Xerox records of advertising seeking job applicants confirm and add to the initial statements of charging parties that Xerox was advertising for applicants for the jobs from which they were being terminated."
8/15/84	*MEMO to Michael Middleton, Associate Gen. Counsel, OGC Trial Services, EEOC, from Paul Brenner, OGC Trial Services, EEOC. RE: Review of PM from N.Y. Dist. Office--Natic [Mass.] School Committee, & Education Association of Natick. "I concur in the recommendation to litigate this ADEA policy case, which raises a novel issue concerning an early retirement incentive plan. The case was originally submitted *** in June 1984, but was returned without approval or rejection *** 'in order to await the Commission's adoption of an enforcement policy regarding early retirement incentive plans.' See attached memorandum Middleton to Williams, dated 6/25/84. However, several Commissioners recently requested that such cases be recommended for litigation without awaiting the adoption of a formal enforcement policy. See attached memorandum, Butler to Middleton, dated 7/20/84. Accordingly, this case was expressly recalled from the district office for OGC consideration. See attached memorandum, Williams to Middleton, dated 7/24/84. *** There is little doubt that the overt age limitation in Respondents' plan constitutes a per se violation of ADEA Sections 4(a) and (c). There is also little doubt that Respondents' plan is not exempt by virtue of ADEA Section 4(f)(2), since only direct benefit is a straight 10 percent sdalary increase.***" [NOTE: HAND-WRITTEN NOTATION AT TOP OF PAGE ONE -- "**REJECTED BY COMM.**-9/4/84: 0-4"; ALSO, SEE 7/20/84 AND 6/25/84 MEMOS ABOVE; ALSO, OBTAIN THE 7/24/84 WILLIAMS TO MIDDLETON MEMO CITED ABOVE.]
AUG 1984	*UNDATED **MEMO** to EEOC Chairman Thomas and Commissioners Gallegos, Webb and Alvarez, from Michael Middleton, Associate Gen. Counsel, Trial Services, EEOC. RE: Litigation Recommendation -- Natick [Mass.] School Committee, & Education Association of Natick. "The Office of General Counsel concurs in the recommendation *** to litigate this ADEA policy case. *** [E]ven assuming that no injury or damages could be proven on behalf of the CP***, OGC would still concur in the litigation recommendation. The stated purposes of the ADEA are 'to prohibit arbitrary age discrimination in employment' (such as the overt age limitation at issue in this case), and 'to promote the employment of older persons' (not to encourage their early retirement for fear of losing out on an age-based incentive). See ADEA Section 2(b). Therefore, in addition to the usual prayers for relief, OGC recommends that the Commission expressly seek to enjoin the denial of pre-retirement salary increases for employees age 55 to 70 who wish to participate in the retirement incentive plan***." [NOTE: SEE 6/21/84, 6/25/84. 7/20/84 & 8/15/84 MEMOS ABOVE.]
8/29/84	**MEMO** to Judy Mathis, atty, EEOC, from Donald Reisler of DBS Corp. RE: Description of Ratio Analysis of the first set of data tapes from Xerox which were of little value to EEOC..
9/4/84	*COMMISSION VOTE to reject the EEOC OGC recommendation to litigate the case involving Natick [Mass.] School Committee & Education Association of Natick. According to a notation at the top of page one of Brenner's 8/15/84 memo (see above), the Commission rejected the recommendation by a vote of "0 to 4." [NOTE: SEE 6/21/84, 6/25/84, 7/20/84, 8/15/84 & AUG 1984 MEMOS ABOVE.]
9/11/84	**XEROX** submits the third set of computer tapes along with documentation. [SEE MEMO OF 4/18/85.]

9/11/84 **MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Carlton Preston, atty, EEOC. RE: Chronology of events: investigation of allegations of age discrimination against the Xerox Corporation. "We***found that more than 45 age discrimination charges had been filed with EEOC district and area offices.***"The evidence which we had been gathering for nine months offered increasing support and confirmation of allegations that Xerox had, during reductions in force since 1980, terminated professionals***on the basis of their age***Documents and testimony by former executives indicated that the company had a deliberate corporate directed policy to eliminate senior, higher paid employees as a costcutting measure. During the relevant years, Xerox terminated approximately 12,000***employees, of whom about 4,000 were forty or over at termination.***Xerox has hired two prestigious outside law firms to represent the company in***Lusardi***and has so far taken three appeals, all unsuccessful, to the Third Circuit. Company officials have been openly concerned that the EEOC might also join in that suit.***"

9/11/84 **MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Carlton Preston, Trial Atty, EEOC. RE: Summary of Evidence Regarding Allegations of Age Discrimination by Xerox."***Xerox***documents ***strongly suggest that a method used to achieve ongoing savings was the riffing of 'higher paid/more tenured' people.*** There were more overall hires than terminations during the three year period when Xerox undertook what it has described as reductions in force.***[N]ewspapers carried ads seeking applicants for positions from which older employees had been laid off or had taken early retirement when told their alternative was to be laid off or fired.***[F]rom 1980 through 1983, there were 14,594 terminations and 16,325 hires***by Xerox.***[T]he ratio of hires to terminations as a function of age changed significantly***from 1980 to 1982.***Many Lusardi plaintiffs, charging parties and potential witnesses have been interviewed [and] their allegations are much alike: that older employees, particularly those over 50***were counselled that they should take the termination package offered or risk being laid off or fired with no benefits***."

9/12/84 **MEETING** (the second conciliation meeting) between Xerox and EEOC staff. EEOC's expert explained that his analysis revealed "striking differences in the age patterns of Xerox employment***show[ing] apparent age discrimination particularly in 1982." EEOC staff renewed its request that Xerox provide the names of those shown on the computer tapes as voluntary RIFs so that it could conduct further interviews. [SEE MEMO OF 4/18/85].

10/12/84 **XEROX** provided EEOC with the third set of computer tapes containing employee data. [SEE MEMO OF 2/28/85].

11/19/84 ***MEMO** to Gwendolyn Young Reams, OGC, EEOC, from Paul Brenner, OGC Trial Services, EEOC. RE: Review of PM -- New York Daily News. "I concur in the recommendation *** to litigate this pattern-or-practice ADEA case. The case involves a collectively bargained 'resignation incentive' (or, 'buyout') plan. Under the plan, Respondent offered to make special cash payments to compositors and stereotypers who voluntarily resigned***. The one-shot buyout plan was officially announced on 12/30/80 and was open only until January 1981***. Those employees [who opted in] received buyout payments on [a descending scale]. *** At noe time during the investigation *** did the Respondent ever claim tht those age-based reductions were justified by any age-related cost considerations. Courts have recently ruled that similar age-based severance benefit plans violate Section 4(a) of the ADEA, and do not fall within the exemption for 'employee benefit plans' under Section 4(f)(2) of the ADEA. See EEOC v. Borden's Inc., 724 F. 2d 1390 (9th Cir., 1984); EEOC v. Westinghouse Electric Corp., 725 F. 2d 211 (3rd Cir., 1983), cert. den., 53 U.S. L. W. 3236 (No. 83-1779, Oct. 2, 1984).*** [T]he Commission has already filed suit in a virtually identical case in the same court where this proposed lawsuit would be filed. See EEOC v. Times Mirror, Inc. [publishers of 'Newsday'], S.D., N.Y., No. 84-Civ-4692, approved by 3-0 vote of the Commission on June 12, 1984, filed in court on July 5, 1984.***" [NOTE: HAND-WRITTEN NOTATION AT TOP OF PAGE ONE -- "REJECTED BY COMM. 1-3 VOTE, 12/4/84"]

11/21/84 ***MEMO** to EEOC Chairman Thomas and Commissioners Gallegos, Webb and Alvarez from Paul Brenner, Senior Trial Attorney OGC, EEOC, thru Johnny Butler, Gen. Counsel (Acting), EEOC. RE: Litigation Recommendation -- New York Daily News. "The Office of General Counsel concurs in the recommendation *** to litigate this ADEA case.***" [NOTE: SEE BRENNER'S 11/19/84 MEMO ABOVE.]

11/27/84 ***MEMO** to EEOC Chairman Thomas and Commissioners Gallegos, Webb and Alvarez from Johnny Butler, Gen. Counsel, EEOC. RE: Request to Reconsider OMC-Galesburg. "This is to request reconsideration of the Commission's decision, by 2-2 tie vote on November 6, 1984, not to authorize litigation in [this] case. *** General Counsel continues to recommend litigation limited to Respondent's policy of denying severance benefits to employees age 65 or older, solely because of their age. The case involves Respondent's contractual policy of denying any 'termination allowance' (severance benefits) to employees who, when permanently laid-off, are: (1) 'sixty-five years of age or over'; or, (2) 'eligible for and elect to take early or advanced retirement. . .' *** Thus, Respondent denies termination allowances to employees under age 65 if--and only if--they are eligible for and voluntarily elect to take immediate retirement when laid off. On the other hand, employees aged 65 or older are denied termination allowances solely because of age, regardless of whether they are eligible for retirement or whether they would voluntarily elect retirement.***" [NOTE: HAND-WRITTEN NOTATION AT TOP OF PAGE ONE -- "REJECTED BY COMMISSION ON RECONSIDERATION 2-2 VOTE, JAN. 15, 1985".]

11/28/84 **MEETING** (the third conciliation meeting) between Xerox and EEOC staff. Again, EEOC staff requested that Xerox release the names of the VRIF employees. Xerox refused to produce the list. [SEE MEMO OF 4/18/85].

12/4/84 ***COMMISSION VOTE** to reject OGC recommendation to litigate the New York Daily News case. According to a hand-written notation on page one of Brenner's 11/19/84 memo (see above), the Commission rejected the recommendation by a vote of 1 to 3.

12/6/84 **TELEPHONE CONVERSATION** between Phil Smith, Office of Gen. Counsel, Xerox, and James Finney, Associate Gen. Counsel, Systemic Services, EEOC. Smith informed Finney that Xerox Corporate had decided not to share with EEOC the list of names of those Xerox employees who had opted for the voluntary reduction in force. Finney responded to Smith that he, Finney, had no alternative but to recommend that EEOC file a lawsuit against Xerox. [SEE MEMO OF 4/18/85].

1/15/85 ***COMMISSION VOTE** to reject OGC request for reconsideration of recommendation to litigate the OMC - Galesburg case. According to a hand-written notation at the top of page one of Butler's 11/27/84 memo (see above), the Commission voted 2-2 to reject the request for reconsideration.

2/12/85 **EEOC** issued a news release on its moving away from pursuing complaints against large companies or industries, and will instead focus on discrimination cases focusing on specific individuals. According to Anne Ladky, executive director of Women Employed, "If the government only pursues discrimination in individual cases it will not make progress in eliminating discrimination overall." Commissioner Webb said compensation should [illegible] only to proven victims of discrimination, not to entire [illegible]sses.

2/28/85 MEMO [illegible]eroy Jenkins, Atty, EEOC, from Judy Mathis, Equal Oppor[illegible]ty Specialist, EEOC, and Carlton Preston, Atty, EEOC. RE: [illegible]us of EEOC v. Xerox investigation and conciliation. Thi[illegible] a background memo and also stresses the necessity for con[illegible]ting with Dr. Reisler, DBS Corporation, to analyze the da[illegible]apes submitted by Xerox, to further develop and refine the e[illegible]nce of age discrimination by Xerox.

4/18/85 [illegible] to James Finney, Assoc. Gen. Counsel, EEOC, from Carlton [illegible]ston, atty, EEOC. RE: Recommendation on Disposition of EEOC [illegible] Xerox ADEA Investigation/Conciliation. "The EEOC first [illegible]came Involved in***1983***Our initial efforts were directed [illegible]owards an intervention***A presentation memorandum to intervene in the Lusardi litigation was prepared and sent to the Commission***[h]owever, the case was never fully presented***Commissioner Webb raised questions in regard to a lack of data he deemed necessary to support Commission litigation.***Throughout this investigation, Xerox has been recalcitrant.***[O]ur interviews with various riffed employees indicated that the so-called voluntary RIFs were not in fact 'voluntary.'***We received copies of confidential memoranda written by Xerox officials demonstrating that there was an official plan to get rid of the older higher paid employees, and hire younger lower salaried recent college graduates***Since Xerox had refused to give us the list of discharged employees***[w]e conducted interviews of approximately fifty victims. These interviews buttressed our earlier findings***it appeared that the agreements to leave were coerced***If they did not take a 'voluntary' RIF or the Bridge to Retirement they would soon be involuntarily terminated with little or no severance pay***These allegations took additional importance when a preliminary analysis prepared by our expert showed tremendous disparities in terminations in the V[oluntary]RIF category of employees over fifty***[O]ur evidence indicates that the problem was not the program per se but the involuntary manner an older employee was overtly or covertly forced to accept it***[O]ur interviews***indicate a strong case of a pattern and practice of the Xerox's deliberate corporate policy directed and implemented by corporate officials to terminate employees over forty on the basis of age only, in violation of the ADEA***Xerox has engaged in dilatory tactics and have misrepresented the facts to the Commission on many different occassions."

5/10/85 MEMO to James Finney, Assoc. Gen. Counsel, EEOC, from Judy Mathis, atty, EEOC, and Carlton Preston, atty, EEOC. RE: recommendation on disposition of Xerox case. After the EEOC's initial inquiry into the matter, "A presentation memorandum to intervene in the Lusardi litigation was prepared and sent to the Commission seeking litigation authorization. However, the case was never fully presented to the Commission; prior to the date it was to be presented, Commissioner Webb raised questions in regard to the lack of data he believed necessary to support Commission litigation." Regarding EEOC's investigation, and negotiations with Xerox for computer data, the memo said "Throughout this investigation, Xerox has been recalcitrant***The Lusardi attorneys were very cooperative in sharing their evidence with the Commission. We received, in confidence, copies of confidential memoranda written by Xerox officials demonstrating that there was an official plan to get rid of older higher paid employees while hiring younger, lower salaried, recent college graduates." The memo described the series of meetings between Xerox and EEOC personnel. At all these meetings, EEOC stressed the need for the names of those persons on the computer tapes so it could conduct interviews to determine if the voluntary RIFs were truly voluntary. Xerox replied by saying that the names would not be released to the

Commission. Since the EEOC did not receive the names from Xerox, it has been unable to locate many victims who are not in the Lusardi case. "To locate additional victims, we must either advertise or serve Xerox with a subpoena***[I]t is our recommendation that we fail conciliation and immediately seek litigation authority to intervene in the Lusardi lawsuit."

6/25/85 ***MEMO** to Commissioners' Special Assistant from Allyson K. Duncan, Acting Legal Counsel, EEOC. RE: Opinion Letter Request. "*** The [Michigan Education Association, a labor organization,] wants to include in its collective bargaining agreements provisions permitting early retirement incentives under certain conditions. *** There is currently no Commission guidance on the substance of the request [for an opinion]. The Commission has yet to publicly address the question of early retirement incentives. There is limited case law that stands for the proposition that a voluntary early retirement plan is lawful under the ADEA. The answer to this opinion letter would provide valuable guidance to the public. The issue of early retirement incentives is of great public interest. The Office of Legal Counsel receives a substantial number of requests, both oral and written, for guidance in this area. Many companies have instituted such plans.*** Our analysis of the issue begins with the understanding that '[e]arly retirement is a common corporate practice utilized to prevent individual hardship. *** [R]easoning may be used to conclude that early retirement plans that waive the actuarial reduction of pension payments for early retirement are *** lawful. *** Under [the buy-out] plan, employees are paid a lump sum for early retirement. Generally, the lump sums are highest for younger employees and decline in direct relation to advancing age. Because of this, such plans violate section 4(a) of the ADEA. However, the reasoning in the attached letter could also be used to find these types of plans lawful under section 4(f)(2). As long as the plan is bona fide and is not a subterfuge because it is voluntary, it may be found lawful. *** The greater payment for foregoing extra years of employment is a reasonable factor other than age within the meaning of section 4(f)(1). *** It is arguable that this analysis conflicts with 29 C.F.R. 1625.7(c) of the Commission's regulations [which] states: 'When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.'***" [NOTE: OBTAIN THE DRAFT OPINION LETTER THAT WAS ATTACHED TO THIS MEMO.]

6/28/85 **MEMO** to Leroy Jenkins, Ass't. Gen. Counsel, EEOC, from Carlton Preston, atty, EEOC. RE: Identification of Potential Classmember in EEOC v. Xerox Corp., ADEA Investigation/Conciliation. "We have included a list of 7 victims who we think are good potential classmembers***This group represents one tenth of the seventy people we have contacted***Xerox terminated 5000 employees [between] March 1, 1980 and March 31, 1983,***we have not been able to contact these employees to get their indivdual stories."

7/18/85 ***MEMO** to EEOC Chairman Thomas and Commissioners Gallegos, Webb, Alvarez and Silberman, from Philip Sklover, Associate Gen. Counsel, Trial Services, EEOC, thru Johnny Butler, Gen. Counsel (Acting), EEOC. RE: Recommendation Against Litigation--Chappaqua Central School District, Charge No. 021-84-0139. "***General Counsel recommends against litigating this ADEA policy case***. [P]articipation in the early retirement incentive plan is strictly voluntary; that is teachers who do not wish to take early retirement may continue working until mandatory retirement at age 70 (age 65 prior to Jan. 1, 1979). *** OGC believes that Respondent's plan violates Section 4(a) of the ADEA which *** makes it unlawful for employers to 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age' (29 U.S.C. 623(a)). However, the ADEA provides certain exceptions to the prohibitions of Section 4(a). *** Section 4(f)(2) of the ADEA provides that '[i]t shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan *** which is not a subterfuge to evade the purposes of th[e DEA], except that no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual [aged 40 - 69] because of the age of such individual' (29 U.S.C. 623(f)(2)). *** It would appear *** that Respondent's plan qualifies for the Section 4(f)(2) exception. *** It is anticipated that the Commission will soon consider a staff proposal to issue an opinion letter taking the position that a truly voluntary retirement incentive plan cannot be 'a subterfuge to evade the purposes of the Act.' See memorandum, Allyson Duncan to Special Assistants, June 25, 1985 ***.*** [A]n EEOC action involving an analogous voluntary severance or buy-out plan was recently dismissed, because OGC concluded that the plan at issue was lawful under Section 4(f)(2) of the ADEA. See EEOC v. Times Mirror, Inc. and Newsday Inc., S.D. N.Y., No. 84-Civ-4692, filed July 5, 1984, stipulation of dismissal entered June 12, 1985.***" [NOTE: HAND-WRITTEN NOTATION AT TOP OF PAGE ONE -- "REJECTED, MOTION NOT TO LITIGATE APPROVED BY COMM., 9/10/85 -- AGST. LITIGATION -- THOMAS, WEBB, SILBERMAN; FOR LITIGATION -- GALLEGOS, ALVAREZ."]

8/12/85 **MEMO** to James Troy, Dir., Office of Program Operations, from Leroy Jenkins, Jr., Dir., Legal Enforcement & Coordination Div. RE: EEOC V Xerox Corp. "During the period of 1980-1983, Xerox terminated approximately 12,000 salaried employees. About 5,000 or 42% were above the age of 40, with the bulk being around 52 years of age. During that time, [protected age groups] represented approximately 34% of Xerox. A large percentage of the terminations of these identifiable individuals left the company under a constructive discharge. The company contends these individuals retired under a benefits plan offered by the company. However, interviews with more than 75 of these individuals reveal that they were given an ultimatum - i.e., take the benefits package or be terminated.*** Moreover, internal [Xerox] memoranda***support our finding that age was a factor in the company's staff reduction efforts.***"

9/13/85 **MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Judy Mathis, atty, EEOC, and Carlton Preston, atty, EEOC. RE: Conciliation recommendation, EEOC v. Xerox. "Though Xerox has indicated willingness to conciliate the individual cases we bring to their attention, they have consistently denied us requested data which would enable us to identify and look at individuals***[I]t is clear that submission of the names by Xerox is the only practicable way we have of finding potential claimants and of computing the specific amount of potential liability Xerox faces."

9/30/85 **XEROX FORM 10Q** report filed by Xerox Corporation with the Securities and Exchange Commission. "In 1983, an action was brought against the Company in the United States District Court for the District of New Jersey which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act ***In 1984, the Company received a letter from the Equal Employment Opportunity Commission alleging that the Commission determined that the Company had violated the Act***the Company engaged in***conciliation and discussions about the merits of the Company's position with the EEOC***To date there have been no further developments." NOTE: SEE ENTRIES FOR 3/25/86, 3/31/86,

FEB. 1986 **EEOC** General Counsel decided not to intervene in the Lusardi suit "because those plaintiffs appear to be ably represented by private counsel." (see 8/7/86 memo to Carlton Preston from Judy Mathis.)

3/25/86	**XEROX CORP. 1985 ANNUAL REPORT** to its shareholders. "In 1983, an action was brought against the Company***which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act***In 1984, the Company received a letter from the Equal Employment Opportunity Commission alleging that the Commission determined that the Company had violated the Act*** The Company has been informally advised that the EEOC has terminated its proceedings in this matter."
3/31/86	**XEROX 10Q report** filed with the Securities and Exchange Commission. "In 1983, an action was brought against the Company ***which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act***In 1984, the Company received a letter from the Equal Employment Opportunity Commission alleging that the Commission determined that the Company had violated the Act***The Company has been informally advised that the EEOC has terminated its proceedings in this matter."
4/17/86	**MEMO** to Leroy Jenkins, Ass't. Gen. Counsel, EEOC, from Carlton Preston, atty, EEOC. Cover memo with proposed conciliation agreement and letter to Philip Smith, Assoc. Gen. Counsel, Xerox, to be sent to Xerox. The letter states: "After carefully analyzing the Company's explanation of its position and reviewing materials presented by Xerox during the investigation and conciliation period the Commission has concluded that the evidence shows a violation of the ADEA.
6/30/86	**Form 10-Q** filed with the Securities and Exchange Commission by Xerox Corporation. "In 1983, an action was brought against the Company***which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act***In 1984, the Company received a letter from the Equal Employment Opportunity Commission alleging that the Commission determined that the Company had violated the Act***The Company had been informally advised that the EEOC had terminated its proceedings in this matter.
7/11/86	**LETTER** to Philip Smith, Associate General Counsel, Xerox Corporation, from James Finney, Assoc. Gen. Counsel, EEOC. "Attached is the Commission's proposed conciliation agreement***After carefully analyzing the Company's explanation of its position, and reviewing materials presented by Xerox***the Commission has concluded that the evidence shows a violation of the ADEA."
7/23/86	**LETTER** to James Finney, Assoc. Gen. Counsel, EEOC, from Philip Smith, Assoc. Gen. Counsel, Xerox. The letter is a chronology of events between the EEOC and Xerox. "Given sufficient information, (Xerox) would investigate and address individual claims of terminations presented to it by the EEOC***EEOC has requested that Xerox provide the names of all persons who participated in voluntary reductions in force in the years 1980-1983. At a meeting in the EEOC's offices in November, 1984, Xerox informed you that we would not provide such names."
8/7/86	**MEMO** to Carlton Preston, atty, EEOC, from Judy Mathis, atty, EEOC. "We made the decision, in February 1986, not to intervene in the Lusardi suit because those plaintiffs appear to be ably represented by private counsel***It is clear that Xerox stopped the massive terminations after the Lusardi suit was filed***Dr. Medoff, the Xerox expert (on statistics)***revealed during his deposition that the analysis undertaken for the EEOC meeting was done by Xerox employees and some analyses represented were not performed at all. During his deposition, he virtually disavowed both the report to EEOC and his expert report in the Lusardi suit."
8/18/86	**MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Judy Mathis, atty, EEOC, and Carlton Preston, atty, EEOC. RE:

conciliation recommendation, EEOC v. Xerox. "***between May and August, 1984 Xerox had assured us verbally and in writing that the computer data they sent us was complete and with the proper documentation for our computer experts to analyze. Their information was completely false ***The statistical analyses performed by DBS Corporation covered the period from May 1, 1980 through December 31, 1983. After analyzing this data, DBS was able to conclude with reasonable confidence that Xerox Corporation participated in a pattern of age discrimination by terminating employees over 40 years old."

9/11/86 **LETTER** to Philip Smith, Assoc. Gen. Counsel, Xerox, from James Finney, Assoc. Gen. Counsel, EEOC. "In the interest of good faith concilaition, attached is a list of information we are requesting***in order that we may discuss specific claims of age discrimination.***This should not be interpreted as an abandonment of our class allegations."

9/22/86 **LETTER** to James Finney, Assoc. Gen. Counsel, EEOC, from Ms. Christina Clayton, Assistant General Counsel, Personnel and Environmental Health and Safety Division, Xerox Corporation. "It is clear that there are continuing misunderstandings between us on key issues***[We] continue to be willing to investigate the 100 cases of individuals with claims arising after March 31, 1983.***We remain willing to conciliate and to cooperate with the EEOC's reasonable requests for further data."

10/6/86 **LETTER** to Leroy Jenkins, Ass't. Gen. Counsel, EEOC, from Christina Clayton, Ass't. Gen. Counsel, Xerox. "In response to your letter to Philip Smith of Sept. 25, 1986, we enclose copies of the relevant portions of [several] documents.***Internal Xerox documents, if there are any, relating to Xerox' disclosure of the EEOC matter in SEC filings would be covered by the attorney/clent privilege."

10/16/86 **ARTICLE** in New York Times "The Xerox Corporation, hurt by declining sales of office equipment and seeking to cut its costs, offered enhanced early retirement benefits to 4,000 of its senior employees today."

12/10/86 **LETTER** to Christina Clayton, Asst. Gen. Counsel, Xerox, from James Finney, Assoc. Gen. Counsel, EEOC. "***[T]ime is becoming a factor. The charges is several years old, and some members of the class stand in jeopardy of losing their claims if the running of the statute (of limitations) is not tolled.***"

12/19/86 **DRAFT PRESENTATION MEMO** to James Finney, Assoc. Gen. Counsel, EEOC, from Judy Mathis, atty, EEOC, and Carlton Preston, atty, EEOC. "Preliminary discovery conducted in the Lusardi suit has supported the allegations made by plaintiffs that Xerox, in order to cut costs, in late 1981 designed and implemented a massive program to get rid of older, higher paid employees and replace them with lower paid new hires.***The evidence obtained by the Commission shows that Xerox embarked on a conscious and deliberate program which violates the ADEA by eliminating older, higher paid employees and by replacing them with younger new hires.***Our evidence shows that from 1980 through 1983, Xerox actually hired many more employees than the number who left. Rather than reducing the number of employees, Xerox was replacing the older, highly paid professionals with new hires who make less money.***There is much evidence, both anecdotal and documentary, that older workers were targeted for elimination from the Xerox workforce.***Older workers were 'counselled' that failure to take the 'voluntary' offer would result in termination with no benefits.***Xerox has, in its presentations to us.***omitted so called 'voluntary RIFs' as it asserts that those who left in this category could not have been discriminated against since leaving Xerox was their choice.*** Repeated requests to Xerox to furnish us the names of (these) persons***have been refused.***The facts belie the Xerox assertion that those it terms as voluntary RIFs chose to leave because some better alternatvie was open to them.***As the agency charged with enforcement of the ADEA, the Commission has an obligation to be involved in important cases to the extent it can help shape the development of case law and can insure that victims of illegal age discrimination are afforded appropriate relief.***If the EEOC is to vigorously enforce the ADEA, it cannot passively allow such apparently blatant illegal acts to continue. Based on the evidence of deliberate age discrimination by Xerox and its failure to conciliate, we recommend that the Commission approve the filing of the attached complaint."

1/14/87 **MEMO** to file, by EEOC staff, re: Conciliation Meeting with Xerox, 1-14-87. "Xerox repeated its recent assertions that our focus on persons terminated after March 31, 1983 is new and is contrary to what we told them in the past.***[However], the proposed conciliation agreement sent in July 1986 focused on this***group for settlement purposes but that any litigation we undertake would probably encompass a much larger group representing a wider period of time.***Our information request***has been outstanding since September, 1986.

1/20/87 **LETTER** to James Finney, Assoc. Gen. Counsel, EEOC, from Christina Clayton, Assistant General Counsel, Xerox Corporation. "This is to confirm the tentative agreement that we reached last Wednesday on a procedure for further conciliation."

2/5/87 **LETTER** to Christina Clayton, Assistant General Counsel, Xerox Corporation, from James Finney, Assoc. Gen. Counsel, EEOC. "Your letter (of January 20, 1987) makes it clear that there were different understandings reached at the January 14th meeting.***[F]urther conciliation efforts will be futile.***To conduct its investigation the (EEOC) had included a detailed request for information in its February 7th letter.***Xerox did not provide the crucial statistical and computerized data requested by the Commission at that time.***When some of that information was produced by Xerox in July of 1984, it was crtically incomplete.***The Commission has found that Xerox engaged in a series of programs which violated the ADEA.***The Commission does not know all of these programs because of the restrictions imposed by Xerox on what information it would release to the Commission.***If within five days of the receipt of this letter (containing an EEOC conciliation proposal), Xerox has not accepted these general terms, we have no alternative but to deem conciliation to have failed pursuant to Section 7(b) of the ADEA, and Systemic Litigation Services will seek authority from the Commissioners to file suit."

2/25/87 **DRAFT MEMO** to Johnny Butler, Gen. Counsel (acting) from James N. Finney, Assoc. Gen. Counsel. RE: EEOC V. Xerox. "***Our evidence shows that Xerox***violated the ADEA by forcing older workers to leave the company.***Throughout our investigation and conciliation, Xerox's actions and assertions have not been in keeping with a sincere or good faith effort to resolve its violations of the ADEA.***Xerox has not been cooperative in supplying requested information and, in fact, misrepresented what computer data it furnished for a period of six months. Xerox has consistently refused to discuss its voluntary RIF programs*** Further conciliation would be unproductive and potentially harmful to those injured by Xerox policies and practices.*** As early as September 1984***we showed compelling evidence of a pattern of deliberate age discrimination.*** Our expert's analysis showed a dramatic pattern of terminations among employees aged 50 to 54.***[W]e***found that the Xerox [involuntary] RIF analysis, which purported to show no difference by age, had been misrepresented in that new college hires have been exempted from consideration for IRIF for two years after hire and were therefore not counted in the analysis.*** [P]otential plaintiffs have frequently suffered financial hardship*** Many have had their retirement benefits cut by 2/3 while they are job hunting at 50 years of age. A defense of economic necessity [according to 29 CFR 1625.7(f)] is not available to employers to justify terminating their older workers.*** Xerox has never rebutted our evidence and has never***responded directly to our findings. Xerox has, on the subject of voluntary RIFs, consistently refused to provide information.

3/3/87 ***MEMO** to William Ng, Deputy Gen. Counsel, EEOC, from Richard Komer, Acting Legal Counsel, EEOC. RE: Cipriano v. Board of Education. "***Your office recommends that the Commission intervene in the District Court case, as requested by the District Court Judge. The Commission should consider providing a document to the court which is narrow in scope [because] the 1986 ADEA amendments in the Omnibus Budget Reconciliation Act, H.R. 5300, which added section 4(i) to the ADEA, will have a significant impact upon the [early retirement incentive] issue. *** Secondly, as you are aware, the Commission has been considering a draft ERI opinion letter requested by the Michigan Education Association. *** Since the 1986 ADEA amendments may render the section 4(a)(1)/4(f)(2) analysis herein moot for most cases arising after 1987, we recommend that the Commission not attempt in the Cipriano case to set a sweeping statement of policy. Rather, it should provide the minimum input that is consistent with its duty to the court." [NOTE: SEE 3/13/87 MEMOS BELOW.]

3/10/87 **MEMO** to Clarence Thomas, Chairman, EEOC, from William Ng, DeputyGeneral Counsel, EEOC. RE: Background information for the briefing [of the Commission] on the status of the directed investigation of Xerox corporation. "In response to the request for background information, we are forwarding copies of a proposed presentation memorandum, which we received from Systemic Litigation Services on March 9, 1987*** The presentation memorandum has not been thoroughly reviewed or approved by this office. We are forwarding the document only for the purpose of providing basic information on the history and nature of the case. [NOTE: PRESENTATION MEMO WAS ATTACHED TO THIS MEMO,ANDISVIRTUALLY IDENTICAL IN SUBSTANCE TO THE FINAL PM OF 3/24/87--SEE BELOW]

3/13/87 ***TRANSMITTAL MEMO** to EEOC Chairman Thomas and Commissioners Silberman, Gallegos and Alvarez, from William Ng, Deputy Gen. Counsel, EEOC. RE: Litigation Recommendation for Intervention in Cipriano v. Board of Education of the City School District of the City of North Tonawanda, No. 84-CV-80C (W.D.N.Y.). "Attached pleased find copies of a recommendation for intervention in the above-styled case***. Due to the importance of the issue involved, we have requested that this case be placed on the first available Commission agenda, rather than be processed through the special notation vote procedure. *** Portions of the litigation recommendation have been revised or rearranged since the Legal Counsel memorandum [see 3/3/87 entry above] was written. and we have added to the recommendation a brief discussion of 4(i) of the ADEA and of the advisability of appearing in an amicus, as opposed to intervenor, capacity." [NOTE: SEE 3/13/87 MEMO BELOW.]

3/13/87 ***MEMO** to EEOC Chairman Thomas and Commissioners Silberman, Gallegos and Alvarez, from William Ng, Deputy Gen. Counsel, EEOC. RE: Brief in Intervention in Cipriano v. Board of Education of the City School District of the City of North Tonawanda, No. 84-CV-80C (W.D. N.Y.). "***[T]he issue *** is whether the *** Board and teachers' union violate *** [ADEA] by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Second Circuit Court of Appeals last year reversed the entry of judgement for the School Board and remanded the case for further proceedings. *** The appellate court ruled *** that the plan violated 4(a)(1) of the

Act, 29 U.S.C. 623 (a)(1), because it withheld an employment-related benefit on the basis of age (785 F.2d at 53). *** The only issue to be decided by the lower court on remand is whether *** the plan is *** a subterfuge to evade the purposes of the ADEA. *** [T]he Second Circuit directed the district court to 'seek the assistance of the EEOC' with respect to the meaning of 'subterfuge' in 4(f)(2) as amended, or with respect to 'the permissable means of structuring voluntary retirement plans.' 785 F.2d at 59. *** The [district] court has now made it clear that it wishes our participation to take the form of intervention, and is awaiting our response. *** [W]e are recommending intervention***. Based upon our review of the law, the ADEA legislative history and the administrative interpretations which are still in effect, we recommend that the Commission's brief present the following analysis. First, genuinely voluntary, early retirement incentives may peacefully coexist with the ADEA. *** Second, plans that do provide unequal benefits because of age are immunized from attack by virtue of 4(f)(2) only where the cost of providing the benefit increases directly as a function of age. *** [T]he legislative history makes clear that Congress considered plans paying unequal benefits to be a 'subterfuge to evade the purposes of the [ADEA],' within the meaning of 4(f)(2), unless the cost of providing the benefit increased with age. This conclusion necessarily follows from the longstanding interpretation of 4(f)(2) set forth in the regulations promulgated by Department of Labor in 1969 and ratified by the Congress in 1978, 1982 and 1986. It is also the position the General Counsel has consistently advocated before the courts of appeals. *** [T]he incentive offered in this case is a 'subterfuge' because the denial of the benefit cannot be justified by age-related cost considerations. *** Additionally, the incentive is structured so as to collide with another statutory purpose; viz, promoting the employment of older workers. *** [T]he employer is providing a disincentive for employees to remain past age 60. Indeed, it is clear that the motive of the North Tonawanda defendants is to eliminate their oldest workers.***" [NOTE: OBTAIN AN EARLIER DRAFT OF THIS MEMO WHICH WAS FORWARDED TO THE EEOC LEGAL COUNSEL IN LATE FEBRUARY 1987 FOR REVIEW -- SEE 3/13/87 TM, PAGE ONE.]

3/16/87 **CLOSED BRIEFING OF THE COMMISSION** by attorneys from the EEOC's Systemic Litigation Services, Office of General Counsel. The following are excerpts from the dialogue recorded on audiotape. Chairman Thomas: "***This is standard practice in industry. I don't know why Xerox is the only one we are after. If Xerox is on the chopping block for this, we have got about 100 other corporations we should be looking at. It's as simple as that. Okay? GM is doing the same thing." Vice Chair Silberman: "There probably are 100 other corporations waiting to see what we do on Xerox." Chairman Thomas: "No, we have already done it. We have already done it. If they were waiting around, they wouldn't have a RIF program." Commissioner Alvarez: "Don't we have something coming from Mr. [Richard] Komer [EEOC Legal Counsel] on this someday?" UNIDENTIFIED MALE VOICE: "We have briefings coming, in fact, in the "Cipriano Brief on the issue . . ." Vice Chair Silberman: "Which goes the other way." UNIDENTIFIED MALE VOICE CONTINUES: ". . . which is coming up now. In fact, we already got it. We have a pending opinion letter which we have a copy of now. It's been around for a while, on the issue of sweeteners.***" Attorney James Finney: "***[I]f someone comes along and tells you that if you opt for a voluntary retirement, you might get 'X'; if you wait for involuntary [retirement], you might get half of 'X'; and neither 'X' nor half of 'X' equals the present value of what you would have gotten at age 65 [had you continued to work], but you feel you have no choice, I think I would find that quite coercive." Chairman Thomas: "I don't say that is coercive--that is reality."

3/23/87 **MEMO** to William Ng, Deputy Gen. Counsel, EEOC, from James Finney, Assoc. Gen. Counsel, EEOC. RE: EEOC v. Xerox Presentation Memorandum. "This revised PM is attached.*** Since briefing the Commissioners on this matter [on March 16] we have reviewed our notes of their comments, and have received several calls from special assistants with questions or clarifications on several points. We have tried to incorporate information, discussion and analysis to address the questions and concerns we received.*** There are three possible courses of action. The Commission might view the findings as supporting an action in the nature of a pattern and practice case*** Secondly, the Commission might decide that the record only supports a consolidated action based on individual claims. Finally, the Commission might determine that the facts do not warrant further action. Since the Commission policy in the area of workforce reductions or early retirement programs is unclear and unsettled, we believe that it is appropriate that they have the clearest opportunity to review and consider the several options presented. Any action taken can be prematurely interpreted--or, misinterpreted--as a reflection of Commission policy. Traditionally, the Commission has been careful to avoid creating confusion as to policy in unsettled, and sensitive areas before it has had an opportunity to formulate its views. We would hope for some guidance as to how this matter might be resolved. It should be noted that some of our complaintants will be affected by the statute of limitations after the end of this month." [NOTE: REVISED PM WAS ATTACHED--WE DO NOT HAVE IT.]

3/24/87 **MEMO** to Clarence Thomas, Chairman, R. Gaull Silberman, Vice Chairman, Tony Gallegos, Commissioner, and Fred Alvarez, Commissioner, from William Ng, Deputy General Counsel, EEOC. "For the following reasons, the Office of General Counsel concurs in the recommendation of Systemic Litigation Services which we received on MArch 23, 1987 to litigate this ADEA case***Conciliation efforts have continued since the LOV was issued.***During the entire investigation and conciliation Xerox has been uncooperative in supplying requested data.*** Five formal conciliation meetings were held.***The statistical evidence developed in this investigation clearly demonstrates that Xerox undertook efforts to rid itself of older, relatively higher paid workers and replace them with young workers.***Individuals who availed themselves of the Bridge to Retirement plan stated they did so only because they had been informed that they would be involuntarily riffed if they did not*** [T]his plan entailed no 'sweetening' of retirement benefits; rather, it caused employees to accept substantially smaller benefits.***Given this, and the testimony of employees that they were made to understand tthey could take this program or leave with nothing, the voluntariness of the election is highly questionable.*** The evidence obtained by the Commission shows that Xerox embarked on a conscious and deliberate program of eliminating older, higher paid employees***and accomplished this end through involuntary reductions in force and through coercing older employees to accept what it termed 'voluntary' programs.***There is extensive evidence, both anecdotal and documentary, that the elimination of older workers from the Xerox workforce was a corporate policy.***Older workers were 'counselled' that failure to take the 'voluntary' offer would result in termination with no benefits.***There is extensive evidence that those eligible for the program were told that if they did not take it voluntarily, they would be-involuntarily terminated.***Based on the evidence that Xerox developed and implemented a deliberate corporate policy which resulted in a pattern of willful violations of the Age Discrimination in Employment Act, and upon the unwillingness of Xerox to conciliate,***we recommend that the Commission approve the filing of the complaint."

3/27/87 **MEMO** to William Ng, from Fred Alvarez, Deputy Commissioner, EEOC. "I am not***convinced that there has been a presentation

	of facts sufficient to support litigation***. [Since the matter has been pending before the Commission for three years]*** "We should have the information (concerning whether Xerox engaged in unlawful discrimination since 1983) in hand now. Given our historic success in enforcing information requests through subpoena litigation, the asserted lack of cooperation on the part of Xerox in providing updated personnel data is not an adequate explanation***"
4/3/87	**LETTER** to all persons seeking EEOC intervention in the Xerox case due to alleged age discrimination against them, who are not parties to the Lusardi class action. "The Equal Employment Opportunity Commission has decided it will not initiate a lawsuit against the Xerox Corporation under the Age Discrimination in Employment Act."
4/9/87	**LETTER** to Christina Clayton, Assistant General Counsel, Xerox Corporation, from James Finney, Assoc. Gen. Counsel, EEOC, "The Commission has determined that it will not initiate a lawsuit against the Xerox Corporation under the Age Discriminaion in Employment Act (ADEA)."
5/19/87	***MEMO** to Charles Shanor, Gen. Counsel, EEOC, from Dianna B. Johnston, Staff Attorney, OGC, and author of the 3/13/87 recommendation to the Commission for intervention in Cipriano. RE: Cipriano v. Board of Education of North Tonowanda. "***[A]ttached is a memorandum to the Commission responding to the Legal Counsel's [3/3/87] memorandum.***" [NOTE: SEE 3/3/87 MEMO ABOVE; ALSO, BELOW, SEE FINAL VERSION, DATED 6/30/87, OF MEMORANDUM TO THE COMMISSION RESPONDING TO THE LEGAL COUNSEL'S 3/3/87 MEMO.]
6/30/87	***MEMO** to EEOC Chairman Thomas and Commissioners Silberman, Gallegos and Kemp (who replaced Alvarez), from Charles Shanor, Gen. Counsel, EEOC. RE: response to memorandum from Office of Legal Counsel Concerning Cipriano v. Board of Education. "***[O]ur brief sets forth the arguments which this office believes should be presented to the district court in this case. *** [W]e are inclined to disagree with Legal Counsel's theory that the new section 4(i) will resolve all such questions." [NOTE: BELOW, SEE 6/30/87 REVISED BRIEF RECOMMENDED FOR FILING IN CIPRIANO V. BOARD OF EDUCATION.]
6/30/87	***MEMO** to EEOC Chairman Thomas and Commissioners Silberman, Gallegos and Kemp, from Charles Shanor, Gen. Counsel, EEOC. RE: Brief recommended for filing in Cipriano v. Board of Education. [NOTE: SEE PROPOSED MEMORANDUM OF LAW BELOW.]
6/30/87	***PROPOSED EEOC MEMORANDUM OF LAW** for transmittal to U.S. District Court, Western District, New York, and authored by Dianna Johnston, Attorney, OGC, EEOC. RE: Cipriano v. Board of Education."***This Court *** requested that the Commission participate in the remand proceedings. In light of that request,*** the Commission has moved to intervene in this case***. Under established Supreme Court precedent, an incentive plan violates Section 4(a)(1) of the ADEA only where, as here, it deprives older workers of the incentive benefit on the basis of their age. *** [T]he Commission believes that defendants will probably be unable to prove that their early retirement incentive plan is justified by age-related cost considerations. Withholding a fixed incentive bonus from employees beyond age 60 cannot be justified on the ground that the employees' age renders extension of the incentive to them more costly. Such a plan, therefore, reduces to a 'subterfuge' because, without such cost justification, it denied them a benefit available to their younger colleagues.*** Incentive plans which make age-based distinctions in the amount of benefits violate Section 4(a)(1). *** [T]he issue is whether the plan's structure--one lump sum to everybody 55-60, nothing to those 61 and over--is a subterfuge. *** [T]he stated purpose of

the Act is not only 'to promote the employment of older persons based on their ability rather than age' but also 'to prohibit arbitrary age discrimination in employment and to help employees and workers find ways of meeting problems arising from the impact of age on employment.' Section 2(b), 29 U.S.C. 621(b). Congress declared it unlawful to discriminate not only in hiring and discharge, but also with respect to 'compensation, terms, conditions or privileges of employment' (Section 4(a)(1). *** [U]nless North Tonowanda can demonstrate age-related cost considerations, its plan is a subterfuge to evade the Act's purpose of eradicating arbitrary age discrimination. For this reason alone, the 4(f)(2) defense is not available here. *** [T]he motive in structuring the plan this way was, in fact, to discourage teachers from working beyone age 60. Withholding benefit or privilege of employment for this purpose is clearly a subterfuge to evade the purposes of the Act. *** This Court should analyze the legality of defendants' early retirement incentive plan in a way that comes to grips with the statute's clear prohibition against age discrimination.***" [NOTE: THIS PROPOSED MEMO OF LAW WAS REJECTED, AND THE TASK OF REDRAFTING IT WAS TAKEN AWAY FROM DIANNA JOHNSTON, ATTORNEY, APPELLATE DIVISION AT EEOC, AND ASSIGNED TO PAUL BRENNER, ATTORNEY, OGC TRIAL SERVICES; ALSO, SEE 7/6/87, 7/9/87 AND 8/5/87 ENTRIES BELOW.]

7/6/87 *MEMO to Charles Shanor, Gen. Counsel, EEOC, from Richard Komer, Legal Counsel, EEOC. RE: Cipriano v. Board of Education. "We have reviewed your Office's brief and memorandum to the Commission***. We believe the brief should address the section 4(1) issue in a footnote, to alert the court to the question of its possible future applicability to early retirement incentives. Given that possibility, the Office of Legal Counsel does not believe this a propitious time for an expansive decision on such incentives under section 4(f)(2); an awareness of section 4(1) may induce the court to frame a narrow decision. *** The Commission should retain the widest possible latitude to formulate policy on retirement incentive issues that are not necessary to a decision in this case. *** In the brief, at p. 29, you state that the section 4(f)(2) defense 'is not available here.' We recommend changing the sentence to say that the 4(f)(2) defense, although available, 'cannot succeed.' *** Finally, *** we suggest that the court be urged to limit the holding of the case to the piculiar facts before it, and that the court not try to set wide-ranging policy on early retirement incentives at this time. The brief should similarly be limited.***" [NOTE: SEE 3/13/87 PROPOSED MEMORANDUM OF LAW ABOVE; ALSO, SEE 3/3/87 MEMO ABOVE.]

7/9/87 *MEMO to Charles Shanor, Gen. Counsel, EEOC, from R. Gaull Silberman, Vice Chairman, EEOC. RE: Draft Amicus Brief in Cipriano v. Board of Education. "***I think the draft brief goes considerably beyond what the Second Circuit has asked us to do, and lays out a policy view with which I disagree, as you know. Moreover, at the Commission meeting at which this incentive plan was disapproved for litigation, both the Chairman and I took the position that this plan was lawful. *** Retirement incentives are provided only to employees who retire voluntarily. Retirement incentives are a quid pro quo: employees who accept them must forfeit the opportunity to continue working and maximize their pensions. This opportunity is generally worth more to younger employees. A greater benefit for younger workers may thus be necessary both to compensate them for the greater years of service they are giving up and to induce them to retire when they would otherwise choose to continue working. If employers are required to provide an equal incentive (or even some incentive) to every employee regardless of age -- and that now means employees of any age not just up to age 70 -- and regardless of the likelihood of voluntary retirement without an incentive, then the resulting cost undoubtedly will cause many employers to abandon the early retirement benefit altogether. Since employees can choose to continue working, and since voluntary retirements may preclude an involuntary reduction in force, retirement incentives in my opinion promote rather than conflict with the purposes of the ADEA.***" [NOTE: SEE 3/13/87 MEMO OF LAW ABOVE; ALSO, SEE 7/6/87 MEMO ABOVE.]

8/5/87 __*FINAL EEOC MEMORANDUM OF LAW__, AMICUS CURIAE in Cipriano v. Board of Education, authored by Paul Brenner and submitted to the U.S. District Court, Western District of New York. Arguments in this brief are dramatically contrary to those presented in the proposed memo of law dated 3/13/87. Moreover, the Commission decided against intervention, as the Court had requested, and instead filed with the District Court an Amicus Curiae brief. "***[B]ased upon a review of the ADEA, its legislative history and administrative interpretations, the Commission believes that early retirement incentives do not violate the ADEA. *** [T]he Commission believes that Section 4(f)(2) of the ADEA protects an early retirement incentive plan even if it provides unequal benefits to older workers, where participation in the plan is voluntary for all retirement-eligible employees and where there is a legitimate business reason for structuring the plan with specific age limitations. *** [A]n employer--and here the union--may prove that the plan 'is not a subterfuge to evade the purposes of th[e ADEA]' by demonstrating that the age limitations are justified by an objective assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives. *** [T]his Court should afford defendants an opportunity to prove that a cost/benefit analysis or some other legitimate business reason justifies structuring their voluntary early retirement incentive plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60. *** By definition, early retirement incentive plans do not compel employees to retire. Instead, the plans provide monetary incentives intended to encourage employees voluntarily to elect early retirement. *** [T]o be truly voluntary, a plan must be available to all employees eligible for retirement. In this regard, the Commission believes that the availability of a 'window' of participation for all retirement eligible employees may be crucial. The defendants in this case apparently provided, and continue to provide, the kind of 'window' which assures all retirement eligible employees a reasonable opportunity to participate in the early retirement incentive plan. *** [B]ecause the Section 4(f)(2) exception is an affirmative defense, it would remain the employer's ultimate burden to prove that the age limitations are justified by a legitimate business reason. *** [T]his Court should afford defendants an opportunity to prove: (1) that their early retirement incentive plan provided a truly voluntary option for all retirement eligible employees to participate; and (2) that there is a legitimate business reason for structuring the plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60." [NOTE: SEE 6/30/87 PROPOSED MEMO OF LAW ABOVE; ALSO, SEE 7/6/87 & 7/9/87 MEMOS ABOVE.]

9/10/87 **HEARING** was conducted by the Senate Special Committee on Aging concerning the EEOC's performance in enforcing the ADEA. When questioned about the EEOC General Counsel's final Presentation Memorandum dated March 24, 1987, which recommended an EEOC lawsuit against Xerox, EEOC Chairman Clarence Thomas stated: "[The Presentation Memorandum] provided no evidence. There was no evidence. That's an assertion.*** The mere assertion [of age discrimination] is not enough in litigation.*** We can't go to court with just the assertion.***"

9/15/87 __*BRIEF AMICUS CURIAE__ of the American Association of Retired Persons, in Cipriano v. Board of Education, U.S. District Court, Western District, New York. "***[T]he Court of Appeals ruled that because the challenged incentive paid substantial benefits and was a 'supplement to an underlying general retirement plan, [it] was a 'retirement' plan for the purposes of 4(f)(2).' 785 F.2d at 54. Subsequent to the Second Circuit's decision, the Supreme Court decided Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) ('Fort Halifax'), which held that a one-time benefit payment was not an 'employee benefit plan.' In light of the Supreme Court's holding, this Court must reexamine the applicability of 4(f)(2) to the incentive in this case. The [Supreme] Ccurt's holding was predicated on the fundamental differences between employee 'benefits' and 'employee benefit plans.' *** Court concluded that a one-time payment constitutes no more than an employee benefit. *** [T]he Court held:***'To do little more than write a check hardly constitutes the operation of a benefit plan.' [T]he holding in Fort Halifax requires a fresh determination by this Court of the availability of the Section 4(f)(2) defense to the incentive in this case. *** Indeed, the decision in Fort Halifax implicitly affirms the appellate decisions in EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984), EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir.), cert. denied, 469 U.S. 820 (1984), and Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), cert. denied, 456 U.S. 975 (1982). In each of these cases, a 'one-time lump sum payment triggered by a single event' *** was deemed not to constitute the type of 'employee benefit plan' to which 4(f)(2) applies. *** [L]egislative history of the ADEA and the longstanding administrative interpretations of 4(f)(2) demonstrate that in order to meet the burden of proving that a 'benefit plan' is not a subterfuge, the employer must establish that it provides equal benefits or incurs equal cost for benefits regardless of age. [T]he specific and very limited purpose of 4(f)(2) was to ensure that employers were not discouraged from hjiring older workers due to excessive benefit costs. *** [T]wenty years of congressional actions and consistent agency interpretations make the following points clear: (1) all employee benefit plans covered by 4(f)(2) must meet the 'equal benefit or equal cost' principle; (2) the only relevant cost for these purposes is the cost of the challenged benefit; and (3) the only exception (since rescinded) pertained to employees participating in retirement plans beyond their 'normal retirement age.' *** Contradicting the law, the legislative history of the ADEA, and the agency's own longstanding regulations, the EEOC suggests that the Court take the unprecedented step of creating an 'exception' to the requirements of 4(f)(2) for 'truly voluntary early retirement incentive plans'. EEOC Brief at 28. Because the justification for the suggested exception to 4(f)(2) is premised on the wholly irrelevant consideration of the voluntary nature of the incentive, the agency's theory is fundamentally flawed. Building on this erroneous premise, EEOC then proposes that the type of costs which may satisfy proof of subterfuge are general economic savings, such as payroll costs. This suggestion blatantly disregards the well-established rule that general economic savings to an employer may never justify overt age discrimination. In practical effect, the EEOC asks this Court to overturn the agency's own regulations as they pertain to the 'subterfuge' provision. This Court should decline the EEOC's invitation to legitimize this unprecedented regulatory about-face.***" [NOTE: SEE ABOVE--EEOC's 8/5/87 MEMO OF LAW.]

10/2/87 ***NOTICE** from John Curtin, District Judge, U.S. District Court, Western District of New York. RE: **Cipriano** v. Board of Education. "The court has now received an amicus brief from the American Association of Retired Persons***.***It is important to determine whether any further briefing is required before a date for argument is set. Any further briefs to be filed shall be filed not later than November 12, 1987.***"

10/5/87 ***SUPPLEMENTAL MEMORANDUM OF LAW FOR THE EEOC AS AMICUS CURIAE**, authored by Paul Brenner, Attorney, Trial Services, OGC, EEOC. RE: Cipriano v. Board of Education. "The Commission submits this supplemental memorandum in order to address one of the arguments raised by another amicus, the American Association of Retired Persons (AARP). The AARP contends that the Supreme Court's recent decision in Fort Halifax Packing Co. v. Coyne *** repudiates the approach of the court of appeals [on whether or not defendant's retirement incentive was a 'employee benefit plan']. *** [T]he Commission disagrees with AARP's reading of Fort Halifax. *** The Commission believes that defendants' early retirement incentive plan qualifies as an 'employee benefit plan' under this reasoning. First, the incentive plan is not triggered by a single, non-recurring event (such as the plant closing at issue in Fort Halifax), but is instead on-going in nature. The plan has been in existance since 1979***. Second, While one option of defendant's incentive plan provides a lump-sum payment, another option provides paid-up medical insurance from the date of retirement (at ages 55-60) until the retiree attains age 65. Thus, the incentive plan creates a continuing financial obligation for the defendant School Board. Third, unlike a state law applicable to every employer, defendants' incentive plan does not cover 'a single contingency which may never materialize.' The defendant School Board negotiated this incentive plan with the defendant Union for actual use. *** Fourth, unlike the state mandated severance pay benefit, defendants' early retirement incentive plan does not exist in isolation. As the court of appeals has already pointed out in this case, the incentive plan is 'functionally related to' and provides 'a supplement to an underlying retirement plan.'***"

12/30/87 **PETITION FOR WRIT OF MANDAMUS** to U.S. Court of Appeals, 3rd Circuit, by Plaintiffs-Petitioners in Lusardi v. Xerox Corp. "Plaintiffs Jules Lusardi, et al. *** petition this court *** for a writ of mandamus or prohibition or certiorari to correct and reverse clear abuses of discretion by the [U.S.] District Court for the District of New Jersey (Honorable Alfred J. Lechner, Jr.).***"

12/30/87 **BRIEF** of Plaintiffs-Petitioners In Support Of Motion For Stay Pending Appellate Review in Lusardi v. Xerox Corp. "This brief is being submitted in support of petitioners' motion for a stay of the order entered by the Honorable Alfred J. Lechner, Jr., dated December 16, 1987, (1) revoking and vacating all written consents filed by former and present employees of defendant Xerox Corporation *** who agreed to join this action as parties plaintiff pursuant to Section 16(b) of the Fair Labor Standards Act ("FALSA"), 29 U.S.C. 216(b), and (2) requiring counsel for the named plaintiffs to mail the Notice of Decertification to Conditional Class Members ("Notice of Decertification") annexed to and made a part of the District Court's December 16th order to 1300 FALSA opt-in claimants within 14 days of the entry of said order.***"

12/30/87 **ORDER GRANTING STAY** PENDING APPELLATE REVIEW by the U.S. Court of Appeals, 3rd Circuit, in Lusardi v. Xerox Corp. "*** ORDERED that those provisions of the December 16th Order *** entered in this matter by the [U.S.] District Court for the District of New Jersey through the Honorable Alfred J. Lechner, Jr., be and hereby are stayed, pending further order of this court***."

1/10/88 **ORDER** from a three-judge panel (Weis, Stapleton and Garth), U.S. Court of Appeals, 3rd Circuit. RE: Lusardi v. Xerox Corp. "It is ORDERED that: The motion for a stay is granted as to the provisions of the district court's order of December 16, 1987, directing that the class be decertified, revoking consents perviously filed, and directing plaintiffs' counsel to send a copy of the notice of decertification to the affected parties; The defendant shall file an answer to the petition for mandamus within 15 days of the date of this order***."

1/12/88 **DECISION** of three-judge panel (Circuit Judges Posner and Coffey and Senior District Judge Noland) in Karlen v. City Colleges of Chicago. This decision rejected the EEOC's rationale in its 8/5/87 Memorandum of Law (see entry above) to the District Court regarding Cipriano v. Board of Education.

APPENDIX II.

CLOSED MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: RECOMMENDATION FOR AN EEOC LAWSUIT AGAINST XEROX CORP.

MARCH 16, 1987

[NOTE: THIS TRANSCRIPT WAS PREPARED BY STAFF OF THE SPECIAL COMMITTEE ON AGING FROM AN AUDIOTAPE RECORDING REPOSITED IN THE FILES OF THE EEOC, THE ONLY EXISTING RECORD OF THE MARCH 16, 1987 CLOSED MEETING.]

Participants in this meeting included: EEOC Chairman Clarence Thomas; Vice Chair R. Gaull Silberman; Commissioner Fred Alvarez; Commissioner Tony Gallegos; James N. Finney, Associate General Counsel for Systemic Services, Office of General Counsel, EEOC; Leroy Jenkins, Trial Attorney, Systemic Services, Office of General Counsel, EEOC; and Judith Mathis, former Investigator, Systemic Services, Office of General Counsel, EEOC.

JAMES N. FINNEY: We move next to a briefing on Xerox. . . Commissioners, we are here today to brief you on an Age [Discrimination in Employment] Act matter which has been in administrative conciliation for quite some time. It arises out of charges we found back in February of 1984 against the Xerox Corporation in connection with a program then in place which involved early retirement options offered to a range of employees. Categories of retirement offers included those employees who were offered what were described as voluntary retirement programs and programs which were described as involuntary programs. I gather there was perhaps a third component, something to do with separations, but issues with respect to that program would not be before us.

We have conducted an investigation into those charges over the course of three years, nearly three years. We have negotiated with the company with a view to attempt to settle the case. The most recent meeting we had with them was the latter part of January. We were unsuccessful in those efforts.

We are aware that, as of the end of this month, some members of the group that we represent will start to lose their protection because of the running of the statute of limitations, and the corporation's unwillingness to give us a general tolling of the statute.

I brought along with me two members of the staff to give you whatever factual briefing, additional information you require. I will then conclude by trying to describe to you the very last positions we took with respect to a settlement--what those problems were.

I might indicate further that there was a good deal of interest expressed in our investigation of this charge. It is indeed an example of a matter which had from the very beginning a good deal of interest, 360 degrees interest. And the conduct of our investigation into the matter, we were extremely careful to cover each of the procedural requirements described so that we could give you the very best recommendation based on our investigation as we could, and that, indeed, is what we intend to give you today.

I would like to ask Judy Mathis and perhaps Leroy Jenkins to join in submitting some additional details on how that initial investigation proceeded from the time of initial charge being lodged back in 1984. . . Judy?

JUDITH MATHIS: After, before we filed the letter of violation, we had from various sources lots of complaints, lots of questions. This program that Xerox was undertaking was also in the newspapers and there was a lot of general interest. We concluded that we had found a violation and therefore issued this letter of violation, and from that point we continued investigating and began conciliation with the company.

Throughout our investigation, we found that Xerox in general was cooperative to some extent in providing computer database, but uncooperative to the extent that they refused to provide any kind of information about the programs they termed voluntary. They had both involuntary and voluntary reductions in force. And, as we explained to them that we were getting lots of separate stories that said the same thing, people who said . . .

[NOTE: THE AUDIOTAPE CASSETTE RAN OUT, LEAVING A GAP OF UNDETERMINED LENGTH.]

MATHIS: . . . termed voluntary, it was involuntary in that I was told, "if I don't take this now, in the next involuntary RIF, I will be terminated with no benefits."

UNIDENTIFIED MALE VOICE: But let's go . .

[NOTE: THE AUDIO CUT OUT ABRUPTLY BEFORE FINNEY BEGAN TO SPEAK.]

FINNEY: The reason the company gave us was that they were reducing the overall size of their workforce to deal with their economic conditions. As a matter of fact, at a meeting we had with Xerox, it's, I believe was September 1984, we heard that explanation and indeed they went further to tell us that most of the people who had participated in the voluntary retirement program were indeed quite satisfied with the benefits they had received. We asked if they would give us the names of some of those people since we were getting comments going the other way.

CHAIRMAN THOMAS: How many comments did we get? I mean how many contacts did we get? Do you remember?

FINNEY: We . . Initially, you mean?

CHAIRMAN THOMAS: Yeah, how many--do you have like a number of the contacts that we have received from different people who retired under this program?

FINNEY: We have on file a list of names of nearly 100 people, most of whom we've either called or written to, and most of whom have given us, at least by telephone, statements of their claims. And some--most of those it turns out, and I should back up. A number of the people who originally filed complaints with the Commission made a decision back in 1983 to opt into the private lawsuit. Some of those people decided to stay with the Commission, so we have a mixed bag.

CHAIRMAN THOMAS: Okay. Now, how . . .

VICE CHAIR SILBERMAN: The charges are consolidated?

FINNEY: The ones who decided to opt in are not part of the private lawsuit. There are about 1300 private complainants in the case.

VICE CHAIR SILBERMAN: But do we have individual charges involved in this?

FINNEY: We have individual charges, including people who rejected an opportunity to opt into the private lawsuit and some who were in fact excluded from the private lawsuit because the events involving their separation took place after March 31, 1983, which was a cutoff date established by the court in that case.

UNIDENTIFIED COMMISSIONER: And how many of those do we have?

FINNEY: We have a list of over 100 names and . .

UNIDENTIFIED COMMISSIONER: How many charges do we have?

FINNEY: I don't know that.

MATHIS: There are three charges that make class allegations in that group.

UNIDENTIFIED COMMISSIONER: These are involuntary reduction people?

MATHIS: The group that we are discussing of over 100 people includes people who left under what Xerox termed an involuntary, and also those who left under what would be termed a voluntary RIF.

UNIDENTIFIED COMMISSIONER: Among the three, do we have anybody who was a . .

MATHIS: Yes, yes, we do. We have a charge from a person who left under a voluntary RIF program and he alleges that he was coerced into leaving.

UNIDENTIFIED COMMISSIONER: And he has a class allegation in this case?

MATHIS: Yes.

UNIDENTIFIED COMMISSIONER: And Xerox won't give us any information about either him or anybody who went voluntary?

MATHIS: They will give us information, but they will not give us--they would give us information about him specifically, but what we had asked for were, you know, a list, the names of all the people who left, a large number of people who left under a voluntary program. That was what they refused to give. They have given computerized data regarding all these people. We don't have the names to connect them to. I think this arose from a different point.

FINNEY: More specifically, at one point in time, I talked directly with the Assistant General Counsel with Xerox, a Mr. Smith. Indeed, he asked us, or the company asked us, to provide them with the names of the individuals we had in our files as being represented by the Commission. I told him that I would indeed provide them with the names. However, at the same time, there was the information that we would need from the company in order to complete a comparative analysis that we would attempt to make if we were in fact going to conclude our settlement negotiations.

I sent him--he asked me to send him a list of the items of information we would need. I did that in September 1985, and I did not hear further from Smith. And I believe shortly thereafter, he retired from the company. So getting information, I had indeed with this (inaudible word or two) agreeing preliminarily the size and the scope of the kind of information we would require to complete our investigation was one of the stumbling blocks we had in the course of negotiating. That letter, by the way, is a matter of record, provided to you.

VICE CHAIR SILBERMAN: Jim [Finney], could you straighten--all of you--could you straighten something out for me? As I was reading through this, I set it down in the following way: the voluntary people, we have a possibility of a pattern of practice, disparate treatment case. Is that correct?

FINNEY: That is the (inaudible word or two).

VICE CHAIR SILBERMAN: And the involuntary ones, it would be a disparate impact with the cost being a reasonable factor other than age discrimination. That is the issue?

FINNEY: Essentially.

VICE CHAIR SILBERMAN: Okay.

(SHORT PAUSE)

FINNEY: I'm sorry . . .

VICE CHAIR SILBERMAN: I just made the point that the voluntary people, we have the possibility of a pattern in practice in disparate treatment. The involuntary people, what we are really talking about is disparate impact, and the issue is whether or not cost can be a reasonable factor other than age. Now, is that the way you see it?

ALVAREZ: Well, I thought I saw more--I thought--actually I didn't see impact at all. I thought that they were alleging, and I know it's just a draft, and you're not ready for it. I thought they were saying that there was a pattern in practice in an intentional way of getting rid of high priced older people, getting rid of older people because of the high price, and (inaudible word or two) impact. But there is a pattern of practice of getting rid of older people because they want young people.

VICE CHAIR SILBERMAN: It is a pattern of practice, yes, it is in fact, because it's--the only way you can prove it . . .

ALVAREZ: It's sort of a mixed motive actually as far as impact.

VICE CHAIR SILBERMAN: Well, I think it's, I mean, what disturbs me about the case and what I find most puzzling and . . .

FINNEY: The reason of some discussion in the field dealing with a matter of this size as a treatment, (inaudible word) treatment matter? Their (inaudible word) writers are reluctant to describe pattern of practice in the ADEA context in the same way we use it under Title 7. For instance . . .

VICE CHAIR SILBERMAN: And the alternative is, you go for a disparate impact analysis, which I'm not . . .

FINNEY: But we believe that it is possible to show this as a matter of disparate treatment. We can talk about the size of it, and one of the cases we cite in the draft was the Sandia case which was indeed a Commission case which pointed out that the courts would look very closely at the business affecting early retirements for purposes of savings.

VICE CHAIR SILBERMAN: And am I correct that cost does not come up as a defense if it is treated that way?

CHAIRMAN THOMAS: I don't, you know, I still--for the voluntary cases?

VICE CHAIR SILBERMAN: Yes.

CHAIRMAN THOMAS: Is that what you are talking about? Jim [Finney] and I have had previous discussions about this; and, of course, we've had a number of these kinds of cases come up. Other than if the issue is coercion. . .

VICE CHAIR SILBERMAN: Yes.

CHAIRMAN THOMAS: . . . And rather than being that is an issue of whether it is voluntary . . .

VICE CHAIR SILBERMAN: Yes.

CHAIRMAN THOMAS: . . . Period. I don't have a problem. My question is--you know, I have read, you know, as much about these kinds of things. Well, GM is going through one now. Monsanto has been through one. This article which you have included in your Attachment B here says that IBM is doing it, Burroughs is doing it. . .

VICE CHAIR SILBERMAN: They're all doing it.

CHAIRMAN THOMAS: . . . These are all their competitors. And the focus is on the senior level employees who would disproportionately be the older employees. And the focus of the plan is on retirement-eligible people who enhance their retirement package and induce them to leave. I mean, it is as simple as that. You give them sweeteners. If that is discrimination, then I guess all of them, are discriminating.

FINNEY: One of the questions, Mr. Chairman, you asked me, when we chatted about this briefly early on, was whether or not and to what extent there were replacements going on in the company's process. In other words, indeed, was this a matter of reducing the size of staff in contemplation of economic reverses, or what. And I was not able to give you an accurate figure at that time, and I did not want talk off the top of my head. But it appears that, we set out I believe in this draft, at the time the people who are members of this class were being laid off, the company continued to replace staff at a very high rate--the figure of 22,000 people in one particular year as against I think it was 1,300 or so people in the protected age group let go--is the kind of troublesome question we have.

CHAIRMAN THOMAS: 22,000?

FINNEY: 22,000, and I went back to verify that with our sources.

(UNIDENTIFIED MALE VOICE): It's a 60,000 employee company.

FINNEY: Those are period figures, I'm sorry. Alright. But I specifically asked the question whether there were people being hired could be treated as people being hired into positions regarded by the company as nevertheless critical in the overall context of reductions of certain other jobs. The evidence we have is that, indeed, those people who were hired on who were younger and the rest replaced the people we are representing in this matter, so that I am . . .

VICE CHAIR SILBERMAN: Which way does that cut?

FINNEY: Well, it, it would, I think, be a strong case for the company if they said we were confronted with economic reverses in 1982, we were at that size, 50,000, we did an analysis and decided we could get on better with 40,000 people, or 35,000. But, if in fact you started out with 50,000, perhaps somewhat higher than that, then I think it undercuts your argument that the purpose of all this was to indeed trim up and deal with . .

VICE CHAIR SILBERMAN: Yes, I agree with that, but, as far as the analysis of the critical positions, I wasn't sure what to make of that.

FINNEY: Well, I was trying to understand whether the company might say: "look, alright, we have something called a turnover rate that goes on regardless, and some of these positions are critical to operations regardless of size; and that, but at the same time, we're doing this over here for something in critical:"--It's just a term I made up to see if I could play devil's advocate for the opposition--"while we are doing this over here, there are certain numbers of clerks and management trainee types and this, that and the other thing that we really don't need or can't afford; so that we have got some people being invited to accept early retirement or to quit over here, and certain kinds of jobs, but there are other jobs up here that we need." It was that kind of reaching to see if we could rationalize what we were dealing with.

CHAIRMAN THOMAS: Let's just, let me just give you, let me just go through this a second. Okay? Now I am not going to get into the one for one [single complaint], because I just don't have the numbers before me. But I am just going to use the article that you gave me which I looked at from the outside, by the end. It says here that they offered sweeteners to the top executives again, and they expected 1,300 people to leave. Now, what they are looking at, of course, is their bottom line. They said that this would save us $75 million a year. Okay? Now, I could, if they were just trying to get rid of older people, you know, I could understand what you are saying. But, if you are looking at what the analysts say in response of the stock exchange to it, this analyst from Merrill-Lynch says that it is appropriate and expected belt-tightening. Okay? In this industry, which has been soft, I don't own any stocks in any of these companies, but I read enough to know that the computer industry has been soft over the last four or five years and very competitive.

Now, if you say to me that you cannot offer sweeteners to your higher priced employees to save money because that constitutes a violation of ADEA, that is a different thing. But I don't think that any of us has enough information to show that what they were doing is just simply getting rid of old people in order to hire young people. If you say, getting rid of higher priced employees who happened to be older, and that's a violation, I am willing to sit down and talk with you about it.

It just seems that the other way though, I just don't see it, and I haven't seen it before. I think that that was the basis of our previous discussions.

FINNEY: Well, I could underscore, we talked on several occasions with the senior people at Xerox, and I don't know whether it is in this draft or in our files, but one of the observations that was made was that, when we got to very hard questions like that--give us some information on which we can try to make some objective decision--that if, one thing or another, we very often were confronted with a general assurance that we should trust the company on what they were about, and our request for specific information was not forthcoming.

Again, when we met with them on January fifth, we told them that we had protracted discussions over a period of two years to accommodate their promises to give us information, but that we were concerned and felt that we had to bring to the General Counsel's and Commission's attention the fact that, if we were not able to conclude a satisfactory settlement by the end of this month, we ran the risk of losing individuals who we are protecting because of the running of the statute of limitations. They did offer us a limited tolling for the 100 or so people that we have on our list of names. I was reluctant to take that responsibility on myself because, indeed, I believe there is at least an argument that there is some showing of more than individual abuses here, and it seemed appropriate for them to at least to give us the agreement to generally toll prospectively, and mark you, we had said we were only dealing with those individuals post-March 31, 1983, because the Lusardi case is, indeed, covering the others.

CHAIRMAN THOMAS: What are you looking for in order to come up with a violation on the voluntary plan? Let's skip the involuntary part, because I'm totally confused. I know that virtually all of the major companies, with which I am familiar, have gone through cost-cutting, and the way they have done it is to buy out the more expensive employees with sweeteners. GM has done it. I know one guy who is an acquaintance of a mutual acquaintance of ours--actually made out like a bandit. I mean, he got his full retirement, he kept all of his benefits, and he got a lump sum of about $150,000, just to simply to leave and he had everything. So he went to start another career.

Now, I don't know how that could be seen as a violation of Title 7, I mean ADEA. I just don't know, and maybe if you could explain it to me, how these sweeteners other than coercion, if you are arguing that there was coercion, I can understand that. But, other than just the sweeteners themselves . . .

FINNEY: Well, leaving aside then for a moment, the question of whether the case law would proscribe a program with a sweetener from (several inaudible words), let's just assume there is something called an attractive buyout offer that might indeed tempt someone to make a voluntary act. What we did was go back and take a look at what people in fact were being offered. In other words, what does the voluntary plan provide you with in terms of payouts, the so-called "a bridge to retirement," as against what you would have achieved--you meaning an employee--had you been able to remain with the company to age 65.

We lined those up and, indeed, we looked at what individuals received under the voluntary plan as compared with what they received under the involuntary plan; and we did not have a chance to put those charts in the package to you but I, but what we found is that there was something quite different than the kind of sweeteners that you and I have seen in dealing with some of the other companies, and it seems to me that all goes to the question, and I will be candid with you, it was an issue that the people from Xerox raised to me and to members of the staff more than once. They said, "How do we know that these people who took something called voluntary are not simply sitting out there and deciding to take a second bite of the apple?" In other words, they told us they were satisfied and now because you come around, EEOC, (several inaudible words). So, indeed, we wrestled with that, and the only way that I can answer that is to look at what in fact anybody got--bottom line.

If it would occur to me that some objective party could stand back and say, "Yeah, I can believe that X might have been tempted by this without regard to his or her age," then that might be persuasive. But, if I look at what they've got in terms of what they gave up, and the dollars ultimately appear (inaudible word), then it seems to me that we, as a Commission, would have gone as far as we can go to lay out a prima facie case, and it would be up to the company to pull its burden and to go forward and explain it. That's the kind of analysis we brought to this process. It would have been helpful if Xerox, I think, had been more forthcoming with certain information.

CHAIRMAN THOMAS: Well which information? So far the only thing you have told me is missing are names.

FINNEY: Well, for example, on the question of whether or not a given individual was the victim of lower level management overreaching as opposed to being part of an overall process. We asked them to take the names of the individual complainants we had, give us the names of people who were left in those units, in other words, tell us what has happened to other individuals in the same situation.

CHAIRMAN THOMAS: Let's go, let's do one thing at a time, Jim [Finney]. Let's go to what the people got to leave. Okay? As to what was there is something just that was laid out here. For example, in this plant, they didn't say that in this offer, the October 16 article. It doesn't say that everybody is going to retire. Okay? It is directed at a certain retirement-eligible group, or the high-priced group; and basically, here is a deal, you take it or leave it. Okay?

VICE CHAIR SILBERMAN: And in here [newspaper article], they talk about increased benefits, and at Xerox they are talking about: "under Xerox's amended early retirement plan, employees who are at least 50 years old and have 10 years of company service as of December 31st, qualify for the increased retirement benefits." As I read your presentation to us, these were not increased retirement benefits. These were dramatically decreased retirement benefits.

FINNEY: As compared with what they would have gotten overall had they been allowed to go through to term.

VICE CHAIR SILBERMAN: So what you are saying is that this article is really inaccurate?

FINNEY: I don't want to criticize the New York Times.

VICE CHAIR SILBERMAN: I mean, that was the source of my confusion. There are . . .

CHAIRMAN THOMAS: I guess it depends on what you compare it to. If you got a full retirement versus if you retire now. It depends on what you compare it to.

VICE CHAIR SILBERMAN: Well that is generally true. I mean, sweeteners are sweeteners.

CHAIRMAN THOMAS: Yeah. What I mean, let's just take for example here, they say here five additional years of service and age in the calculation of benefits. Okay? So, if you are 50 years old, you get five additional years, okay, of benefits. You don't get what you would get if you stayed until full retirement. So there is a reduction in that sense. But there is more that you would get that particular day.

LEROY JENKINS: I think one point that's causing a real confusion. The article refers to a policy that Xerox is presently engaged in.

THOMAS: I understand that.

JENKINS: This is not the same . . .

CHAIRMAN THOMAS: I understand too. What I am trying to do is get an idea of what the first plan was, sans the replacement issues and people-being-hired-into-the-organization issue. You are not talking about a group of dumb people. You are talking about highly paid executives, many of whom probably make up well into the six figures.

JENKINS: It's my general understanding that, under the first plan, they received approximately 15 months of their salary to be spread over a 30-month period of time. You had to be at least 51 and one-half years of age in order to participate in the program.

FINNEY: Fifty-one-and-one-half--that is the bridge to retirement.

CHAIRMAN THOMAS: Okay, now, what about the retirement plan?

JENKINS: Well, it would be calculated based upon the earnings that you had had over whatever the period of time was for the formula up until that point, age 51 and one-half.

CHAIRMAN THOMAS: Okay, but they didn't enhance the retirement package, that is what you are saying?

JENKINS: It is not my understanding that they did.

MATHIS: Another point too--the people who make salaries in the six figures, those people are treated in an individual way. They can negotiate their own packages, and the people with whom we have dealt are not in those kind of groups; their maximum salary might be $70,000. Most of them are around $35,000 to $40,000, I would say.

UNIDENTIFIED COMMISSIONER: Let me ask the Chairman's question, at least, what I thought he was asking. How are we going to prove coercion in that context?

JENKINS: The essence of our proof on coercion derives from a lot of the individual testimony, as well as what I think is the focal point for the discriminatory practice which is not the bridge to retirement plan itself, but the method by which it was implemented, and the instructions that were given to the middle level managers to implement the policy.

We have attached to our draft package three memos which were distributed to the staff of Xerox, and it is our interpretation of those memos that it did encourage middle management in Xerox to aim their efforts towards higher salaried, higher tenured employees. I think it formed the basis for a zealousness that was in fact implemented by the middle management employees.

UNIDENTIFIED COMMISSIONER: But isn't it true of virtually every reduction in force plan of every one of the companies goes after the higher tenured, the longer tenured and higher paid salaries?

JENKINS: That's true, and I think if it had remained voluntary, the company would have been fine.

UNIDENTIFIED COMMISSIONER: Let's touch on the voluntary part of if. Where is it fudged between voluntary and involuntary?

JENKINS: Well, the policy appeared to have a snowballing effect. From the early years, by way of illustration, an employee who was asked to come into his supervisor's office, the bridge to retirement plan was explained to an employee. The employee then had an option to elect to take the plan or not to take the plan. If the employee opted not to take the plan, then it was explained to him that he would have been slotted for an involuntary reduction in force. And so he would--in many instances, he quite naturally elected to opt into the plan. He was told that there would be no benefits if he was involuntarily retired. As more employees saw what was happening, the supervisors no longer had to go through the full explanation, because they knew if they got called in to have the plan explained to them, that an involuntary reduction in force, or involuntary layoff, was forthcoming. And this we have gathered through interviewing 100 or so people that we . . .

VICE CHAIR SILBERMAN: Is that a violation?

JENKINS: I'm sorry?

VICE CHAIR SILBERMAN: Is that a violation?

JENKINS: It is my view that it is, because of what I interpret it as of a coercive nature to the reduction, and it is tied into the fact that these were higher tenured employees, and that was the focal aim of the policy.

VICE CHAIR SILBERMAN: But, when you say it is tied into that fact . . .

JENKINS: I think higher salaried and higher tenured is endemic to age. It is directly related to age.

VICE CHAIR SILBERMAN: You lose me on that one.

UNIDENTIFIED COMMISSIONER: (two or three inaudible words) the question is, was that coercive? But is that that voluntary? It seems to me that doesn't sound very voluntary if you say you can voluntarily leave or we will fire you.

VICE CHAIR SILBERMAN: Well, if I understand the (inaudible word), it runs the other way.

UNIDENTIFIED COMMISSIONER: Well, I am not saying that it is coercive. That's fine, but I am just--We asked the question, is it voluntary, if that is the choice that's put to you. I am not saying it is illegal or coercive. I say it's not voluntary.

SILBERMAN: That's what I asked. I asked not was it voluntary, but was it a violation--is it illegal?

UNIDENTIFIED COMMISSIONER: Well, it doesn't sound voluntary because it isn't. You have been selected, you have the choice to quit or to be fired, and here's the money if you quit, and here's the door if you don't. I don't think you can call that voluntary at all.

CHAIRMAN THOMAS: That is the nature of every single one of them. We are going to downsize our company.

UNIDENTIFIED COMMISSIONER: Right.

CHAIRMAN THOMAS: Okay? If you leave between now and this date, you can have this. We can't guarantee you that you are being here after the RIF. That's the bottom line. That's exactly . .

UNIDENTIFIED COMMISSIONER: But that's different than saying--there is an additional concern: if you don't take it, you go on a RIF.

CHAIRMAN THOMAS: Well, I don't see that any place.

UNIDENTIFIED COMMISSIONER: Well, there was some evidence he was just giving.

VICE CHAIR SILBERMAN: Well, there is evidence in here that that's what people say happened to them. Doesn't, isn't it really incumbent upon the whatever company it is in a situation like that to not disadvantage, to have these be enhanced programs? If we can prove that these programs are really not enhanced, then do we have a better or more rational--how would you put it? I mean, Frank, I am totally consonant with what you are saying in terms of what kind of law that we are establishing here. I mean, I think that this is probably the most important thing that we will decide for a long, long time. Because, if, if we go ahead and try and try a case in which we say that cost is not a reasonable factor other than age, I think we have done a terrible thing.

CHAIRMAN THOMAS: Let's just read what it says right here. I just--alright--I can't tell you what an individual--if I were an employee and I could get two bites of the apple, I'd tell you anything I could. Okay? I mean, I have heard enough stuff against me since I've been at EEOC to know how people can come up with all kinds of stories. But let's just read this right here. "This group should be," understand, talking about the retirement-eligible people, "this group should understand a message similar to the above, i.e., substantial salary continued, continuance via the voluntary RIF may not be offered again," typo in again; "In addition, it should be made clear that the grade ten above population will be affected significantly by the pending RIF." Okay. "Each individual should understand that there is an involuntary RIF jeopardy and that management will accept and approve virtually all applications for voluntary RIFs made to me." That is the whole nature. We are going to have a RIF. We prefer not to put it in an involuntary way, so you try to buy people out to avoid it. Okay? I mean, you gotta RIF, you gotta downsize your company. We can either do it involuntary, or we can do it voluntary.

VICE CHAIR SILBERMAN: What is there about these individual cases that would, as you lawyers say, make it involuntary?

UNIDENTIFIED COMMISSIONER: Can I say something here?

CHAIRMAN THOMAS: (inaudible word or two)

UNIDENTIFIED COMMISSIONER: Yes, that's true. But the question is, is it targeted on the young people? The reason that you're voluntary--I can see some reason for trying to voluntarily--and unless we get enough of them to volunteer, we're going to have to lay off. I think that's just the way it is. I mean that is the bottom line. And, if that is the point you are making, I agree. But, if you target your efforts on the older people, (several inaudible words), you could be on the streets.

CHAIRMAN THOMAS: No, that isn't--the program is a voluntary RIF program.

UNIDENTIFIED COMMISSIONER: Right.

CHAIRMAN THOMAS: Okay, let's just put--the people that you're giving the best deal to are the people who are eligible for retirement under the program.

UNIDENTIFIED COMMISSIONER: Right.

CHAIRMAN THOMAS: Okay? I mean, we just have to understand that the voluntary part is going to be targeted toward them. I mean, the whole program--every single one of them, Monsanto's was, GM's is. I am sure IBM's is.

VICE CHAIR SILBERMAN: It's the only humane way to do it. They're the ones who have an alternative source of income.

CHAIRMAN THOMAS: You see, it's the voluntary part. Now, if you are saying that the involuntary part was also targeted toward them. You see what I am saying?

UNIDENTIFIED COMMISSIONER: Yeah.

CHAIRMAN THOMAS: Then maybe I could understand what you are saying. I don't see anything that says that.

UNIDENTIFIED COMMISSIONER: Well, but you say they are hooked together.

CHAIRMAN THOMAS: No, it's not. It doesn't say that.

UNIDENTIFIED COMMISSIONER: The paragraph you read said we should try to get people to voluntarily because you are in jeopardy of an involuntary.

CHAIRMAN THOMAS: No, it says there is an involuntary jeopardy.

UNIDENTIFIED COMMISSIONER: Right.

CHAIRMAN THOMAS: It didn't say it was directed particularly to the people in the voluntary. But you gotta understand that you aren't going to be insulated from the involuntary.

UNIDENTIFIED COMMISSIONER: Right.

CHAIRMAN THOMAS: That's the way I read that.

UNIDENTIFIED COMMISSIONER: That's probably--I don't know if they're arguing that that would be unlawful--to say that you wouldn't be insulated. But I thought he was arguing that . . .

CHAIRMAN THOMAS: We had testimony from an individual that in fact they said it was a one-to-one kind of thing: you either take this or you are going to get involuntary.

JENKINS: That's correct.

UNIDENTIFIED COMMISSIONER: Well, if that person was selected for that message on the basis of their tenure or age . . .

CHAIRMAN THOMAS: Okay. Now that's fine. I don't have a problem with that. Now, to move that to an entire organization. Okay?

UNIDENTIFIED COMMISSIONER: That's why I asked them if their evidence wasn't coercion.

CHAIRMAN THOMAS: Yeah, I mean, if it is one-on-one, I don't disagree when you take the one on one charge or 100 or whatever and argue. I don't have a problem with it.

VICE CHAIR SILBERMAN: Or that they had a pattern. I think you could even go so far as to say they had a pattern of offering it only to the older people and then making it a one on one. . .

UNIDENTIFIED COMMISSIONER: That's right. I think that's true. But, I mean, if that is what your case is about, you might do alright. But, if it is more than that, I don't know what you have.

JENKINS: Well, we do rely in large part on the 10th Circuit decision in U.S. vs. Sandia, where they had a completely involuntary program. And, while I guess we do not spell it out as explicitly as perhaps we should have in the presentation memorandum, we do take a look at the involuntary RIFs as well, and aggregated them with the voluntary RIFs, and it was disproportionately over the protected age group of all these separations from Xerox during that period of time.

CHAIRMAN THOMAS: Was it across the board, across the company, or was it in the upper executive ranks that they were trying to get rid of people?

JENKINS: It was in salaried positions.

CHAIRMAN THOMAS: Non-exempt positions?

JENKINS: Yes.

CHAIRMAN THOMAS: Okay. Well . . .

VICE CHAIR SILBERMAN: This is Sandia, or in Xerox?

FINNEY: Xerox.

CHAIRMAN THOMAS: Okay, let me ask you this. Across Xerox's population, employee population, is there an age difference between the non-exempt and the exempt population that's consonant with it?

JENKINS: I understand your question, but I don't know the answer to that.

CHAIRMAN THOMAS: I mean, you can't compare--you're comparing apples and oranges.

UNIDENTIFIED COMMISSIONER: Well, but I would think older people would voluntarily opt out more than younger people would.

CHAIRMAN THOMAS: But he was doing the involuntary though. He was saying that the involuntary was disproportionately older compared to Xerox's population. Is that right?

JENKINS: That's correct.

CHAIRMAN THOMAS: And I am asking, and if it's in the non-exempt, is it disproportionate to the age in the non-exempt versus the total population?

VICE CHAIR SILBERMAN: What do you mean when you say non-exempt? You always use that term, and I don't know what you are talking about.

UNIDENTIFIED COMMISSIONER: You mean hourly versus salary.

CHAIRMAN THOMAS: Yes.

JENKINS: Yeah. We didn't examine the non-exempt category because it was our understanding that these programs were principally for the exempt catetgory.

VICE CHAIR SILBERMAN: It is not high salary or anything, it's just salary?

CHAIRMAN THOMAS: Salary. It should be the exempt group.

UNIDENTIFIED COMMISSIONER: So your numbers are just on the salaried people?

JENKINS: That's correct.

VICE CHAIR SILBERMAN: Well, I'll bet at a place like what you're talking about--in Xerox--and what they were trying to restructure here was not . . .

CHAIRMAN THOMAS: It was staff.

VICE CHAIR SILBERMAN: . . . was the staff that were people, you know, they go to the colleges. They hire them very cheaply to do what is basically the same job that if they keep them on for 23 years, they're still doing on a commission basis. But it is much more expensive to keep on the one that's been there for 23 years. And they can get the same job done. These are sales jobs. I don't know where that takes me, but . . .

FINNEY: By the way, we did consult with Legal Counsel to see whether indeed the Commission had (inaudible word) to the policy issue of retirement plans. I didn't come up with anything that's specific or different than the cases as we read them. In other words, I had some notion that there might be some policy evolving on this point.

VICE CHAIR SILBERMAN: Some policy evolving in what sense?

FINNEY: Well, taking cost savings into account when one is looking at . . .

VICE CHAIR SILBERMAN: In the cases?

FINNEY: In Commission policy.

VICE CHAIR SILBERMAN: Oh no, we haven't, we haven't, we haven't. (inaudible word or two) want to talk about it. That's what is so interesting about this case. We have done it on a case-by-case basis and we haven't even wanted to talk about it there. And the law is galloping ahead of us.

CHAIRMAN THOMAS: Okay, let me get back to it. In the RIFs . . .

JENKINS: Yes.

CHAIRMAN THOMAS: . . . Did you get disproportionate--you said it was disproportionate, the involuntary was disproportionate?

JENKINS: That's correct.

CHAIRMAN THOMAS: (several inaudible words).

UNIDENTIFIED COMMISSIONER: Well, maybe we'll have another chance one day?

(UNIDENTIFIED MALE VOICE): That's Reprographic Business Group.

JENKINS: (several inaudible words).

MATHIS: The chart that is in the (inaudible word or two) Reprographic Business Group is evidence that they were aware that this was disproportionate for I-RIFs as well as V-RIFs. We have in the body of this proposed PM, I think on page 12, there are some figures dealing with I-RIFs in general.

UNIDENTIFIED COMMISSIONER: Now, before you run off with that. Now, this is age? For all the RIFs, 50 and over were 13 percent. And then voluntary RIF, that's what percentage, the 58 is the percentage of people who took . . .

MATHIS: Of all the people who took the V-RIF, the percentage that were that age . . .

UNIDENTIFIED COMMISSIONER: Right. Okay, we could expect that.

MATHIS: Right.

CHAIRMAN THOMAS: Could you break down the involuntary for us--percentages?

MATHIS: Well, of all the people who were involuntarily RIFed, 27.5 percent of those people were 50 and above. And it seemed to us that because the policy . . .

CHAIRMAN THOMAS: Forty-five percent was . . .

MATHIS: I'm sorry, 45 percent were 40 to 49, and 27.5 percent of all those who were involuntarily RIFed (inaudible word or two).

ALVAREZ: Have you done a statistical analysis on this? Do we know that this proves anything?

CHAIRMAN THOMAS: Well, the (inaudible word or two) is pre-RIF, post-RIF right here, Fred.

JENKINS: The main reason that it didn't change much is that they reduced their work force by approximately 4,400 of the older workers, while at the same time increasing the work force by about 22,000 of the younger workers.

CHAIRMAN THOMAS: Well, no, but how can that be when 39 and below is less than two percent higher, 1.8 percent higher?

JENKINS: Right.

CHAIRMAN THOMAS: If that were true, you'd get a disproportionate increase in the 39 and below.

MATHIS: I'd like to make a point about this if I could, please. This is for one group at one particular time in the Monroe County facility. We didn't do any kind of overall statistical analysis from this. We included as evidence that the company was aware that there was this disproportionate (inaudible word). And another thing we have found is that new college graduates were not counted on these figures at all. They were hiring people constantly who were college graduates and they weren't counting them either, counting them in anything, and they were exempting them from I-RIF consideration. So, while these figures are not meant to be our statistical analysis of what was going on there.

CHAIRMAN THOMAS: Well then, what are we basing the significant impact on older workers on if it's not this?

MATHIS: In the body of the PM, I think on page 12, there is an explanation. We had a statistical analysis done of the company as a whole, on salaried workers as a whole. And we are basing our conclusion on the results of that analysis.

VICE CHAIR SILBERMAN: It doesn't matter how you dance around it. What this company is trying to do is get, lower its costs. The way it is lowering its costs . . .

CHAIRMAN THOMAS: That's right.

VICE CHAIR SILBERMAN: . . . is getting new hirees in there. It is sweetening the pot for the older workers, but nowhere near as much as one would expect under these circumstances, and we really have to decide whether or not whether that's bad.

UNIDENTIFIED COMMISSIONER: Whether that's bad.

CHAIRMAN THOMAS: But they're sweetening it even again.

VICE CHAIR SILBERMAN: What do you mean, they're sweetening it again?

CHAIRMAN THOMAS: Again, the October article in the New York Times, October 1986, they are upping the ante again.

VICE CHAIR SILBERMAN: Oh, I see, that's a later article. Well, that's probably the market's forcing them to do that. They're not getting enough people to retire.

UNIDENTIFIED COMMISSIONER: Does the company concede that? I mean, what do they say when you say, "look, you've involuntarily retired 2,000 people, but you have hired 55,000 people"? Well, what do they say when you say that to them? I mean, do they concede what the Vice Chairman says? I mean, is that the issue here?

FINNEY: Well, you might be surprised at what they tell us, but they tell us to trust them. Most of the people who are going out are really going out because they want to, and they really are ultimately going to at some point collapse the work force.

UNIDENTIFIED COMMISSIONER: At some point, but they're still hiring more than they are letting out the door, or sending out the door.

FINNEY: The other piece we got, and I heard this from Mr. Smith over the course of about eight or nine months, was that indeed there had been some overall improvements, and that if we were to look at the profile of new hires, we would find that it reflected roughly the ages of people across the company.

VICE CHAIR SILBERMAN: Sure, because they know we are investigating and so they brought out . . .

FINNEY: But we were never shown those figures either. They were hiring roughly the same proportion of people over 40 as they were letting go at the other end in the new hires.

UNIDENTIFIED COMMISSIONER: Okay, but just let me be specific then. They don't have an answer to your argument that they are hiring more than they are letting go?

FINNEY: No.

VICE CHAIR SILBERMAN: Well, they do have an answer. It's cheaper for them. They're hiring cheaper people.

UNIDENTIFIED COMMISSIONER: Well, I don't see what the issue is. If that's the issue, I want to know what it is.

MATHIS: They said that to us. When we asked them that, they changed the subject.

UNIDENTIFIED COMMISSIONER: Well, I mean, if they keep saying we're trying to cut costs, that's one thing.

CHAIRMAN THOMAS: Well that's, I mean, they did say, that's what the spokesman said unabashed in the article. Right here, it says, "we're trying to cut costs." But it seems to me, if they're hiring people over 40, if they're hiring people over 40 at a lower costs, it would seem obvious that their emphasis is on cost, not age.

UNIDENTIFIED COMMISSIONER: Not on numbers--employees. Why don't they just lower the pay of the people they have?

CHAIRMAN THOMAS: They are not going to do that. That's what they are doing, buying out the expensive people.

VICE CHAIR SILBERMAN: You know, we get back to this again and again and again. Do they have to do that? Sure, that is a way they could do it. But does the law require them to do that?

UNIDENTIFIED COMMISSIONER: I guess that is what it comes down to.

VICE CHAIR SILBERMAN: You know, you (inaudible word or two) around these cases, and you think: Ah-Ha! I can really figure out a good pattern in practice and disparate treatment and all the rest of it; and there probably are a few in here that you could. But basically, what we are going on here is the disparate impact on older people. And is cost a reasonable factor other than age?

UNIDENTIFIED COMMISSIONER: Well, you see, I thought it was a mixed motive case--part money, part age.

CHAIRMAN THOMAS: Well, I think that, if you can show that these people were coerced out, I don't have a problem with it; that they were just, they were gonna be pushed, that the older people were pushed out anyway, so they went out voluntarily as a class, then I don't have a problem with it. But this other stuff, and this is reality in the world today. These guys are cutting costs so they are not going to be out of business. It's as simple as that.

VICE CHAIR SILBERMAN: There is another point that we have to make here, and that is because this is a systemic case. . .

(UNIDENTIFIED MALE VOICE): (several inaudible words) It's their business. I mean, it's not illegal to buy out their expensive people. (several inaudible words)

VICE CHAIR SILBERMAN: . . . The point that I am concerned with and that I would like to make is that because this is a systemic case, and because it is, you know we are going in and talking to a big company about an alleged pattern in practice violation, and the law is not clear as far as anyone is concerned, least of all us. We have not given any clear guidance as to what we consider a violation to be because we . . .

CHAIRMAN THOMAS: If it is voluntary, it is Okay.

VICE CHAIR SILBERMAN: Well, then I think maybe we ought to . . .

(INAUDIBLE DIALOGUE OF APPROXIMATELY 10 SECONDS DURATION BETWEEN TWO OR THREE INDIVIDUALS)

CHAIRMAN THOMAS: It's voluntarily moot. . .

(LAUGHTER)

VICE CHAIR SILBERMAN: When you ask, why don't they give the defense of cost, I think they don't give the defense of cost because, for the most part, the case law is against it. And we haven't done anything to establish it. And I think it's not credible. Clarence, to say that you have given this guidance to them--because you haven't.

CHAIRMAN THOMAS: Ricki [Silberman], if that is your standard, every single . . .

VICE CHAIR SILBERMAN: What is my standard?

CHAIRMAN THOMAS: The costs.

VICE CHAIR SILBERMAN: That is not my standard. You know very well it is not my standard.

CHAIRMAN THOMAS: Every single one of these (several inaudible words).

VICE CHAIR SILBERMAN: We ought to as a Commission say that cost can be a reasonable factor other than age, because that is not the way we have gone, and give some predictability so that these companies can then come in and say we did it because of costs. Then we can say whether it is voluntary or not. I don't think that we are being responsible or credible in going on and letting them come up the way we do.

CHAIRMAN THOMAS: Well, this one has been around a long time. This isn't just a recent one.

FINNEY: They did tell us that they were going to apply some sort of matrix on the approach to the business of reducing staff which would take into account age and experience and the rest of those things. Unless we looked at the patterns of what happened, as one might have expected that the more senior people (inaudible word or two). My point was that they didn't follow their own pronounced process in reducing the size of the workforce, that is to take experience into account in making decisions as to who to keep and who to let go. Indeed, the more experienced people who happen also to be the more highly paid people were the ones (inaudible word).

VICE CHAIR SILBERMAN: I think that only makes my point--that they are trying. They are groping to see what will satisfy us, and then groping to see what will satisfy us, they dig themselves deeper and deeper because nobody wants to say, "look, we are trying to save money, and older people are paid more most of the time, sometime," whatever percentage of the time it happens.

UNIDENTIFIED COMMISSIONER: Ricki [Silberman], we noted (several inaudible words). That was a case out of San Francisco where there was a layoff at Kaiser, and over the objection of some of our stellar attorneys. we thought that it made sense that the company reduced in size.

VICE CHAIR SILBERMAN: Yes.

UNIDENTIFIED COMMISSIONER: I am not sure we are against every kind of reduction . . .

[NOTE: AUDIOTAPE RAN OUT, LEAVING A GAP IN DIALOGUE OF UNDETERMINED LENGTH]

VICE CHAIR SILBERMAN: No, I was not saying that. All I was saying is that I don't think that for the general public, the general respondents or employee public--certainly not for the Bar--that what has been happening in the courts which seems to run the other way as far as cost being a reasonable factor other than age. I mean, we had some Congressional hearings, if you remember, in which this point came up, and we had four or five Senators who looked as though it was absolutely the worst thing in the world to say that cost could be a reasonable factor other than age. So I think it is time to bite the bullet.

CHAIRMAN THOMAS: First of all, I wasn't relying on that. This is a standard practice in industry. I don't know why Xerox is the only one we are after. If Xerox is on the chopping block for this, we have got about 100 other corporations we should be looking at. It's as simple as that. Okay? GM is doing the same thing.

VICE CHAIR SILBERMAN: There probably are 100 other corporations waiting to see what we do on Xerox.

CHAIRMAN THOMAS: No, we have already done it. We have already done it. If they were waiting around, they wouldn't have a RIF program.

ALVAREZ: Don't we have something coming from Mr. [Richard] Komer [EEOC Legal Counsel] on this someday?

(UNIDENTIFIED MALE VOICE): We have briefings coming, in fact, in the Cipriano Brief on the issue . . .

VICE CHAIR SILBERMAN: Which goes the other way.

(SAME UNIDENTIFIED MALE VOICE AS ABOVE): . . . which is coming up now. In fact, we already got it. We have a pending opinion letter which we have a copy of now. It's been around for a while, on the issue of sweeteners. We can redistribute copies to you.

[SHORT PAUSE IN DIALOGUE]

VICE CHAIR SILBERMAN: Well, what's your pleasure, Mr. Chairman?

CHAIRMAN THOMAS: There was no vote on this. This is just a briefing.

FINNEY: We were asked to brief the Commission, and we certainly appreciated the benefit of your discussion. However, we do have, we are confronted with the reality that at the end of the month the statute of limitations runs out, and people are going to be lost.

We have negotiated with Xerox over the course of nearly three years, and I do believe we have come to a serious point where we can't go further.

VICE CHAIR SILBERMAN: Can you look at those cases, those people that are about to lose their rights as it were in terms of the kind of guidance that we have given you today? In other words, if it is not voluntary, then that is something we should continue on; and, if it is voluntary and cost would be used as a defense and you are basically looking at a disparate impact case, then I don't know that you got the votes. I mean, I don't want to overread what it was being said today, but it seems to me they need some guidance as to what to do about this case.

CHAIRMAN THOMAS: Well, I just, you know, I think I've been, Jim [Finney] and I have talked about this case. In fact, I was surprised to see it was still here. About two or three months ago, we talked about it several years ago, I think. But I feel strongly that these voluntary reductions in force, particularly among these top executives, unless someone can show me it is coercion, they are all directed at more senior people.

VICE CHAIR SILBERMAN: What if it is not top executives? What if it is, as it is here. These are not top executives.

CHAIRMAN THOMAS: There are many executives. I mean, you have a certain amount of age--not age--but you have a certain amount of a number of years . . .

VICE CHAIR SILBERMAN: And cost of salary.

CHAIRMAN THOMAS: . . . and it just adds a sweetener. It is a sweetener. We will up you in a certain way, and you can take it or leave it. Now if there is coercion, then I think it is a whole different issue. Okay? But, as long as it is voluntary, I don't see where costs or anything else has anything to do with it.

VICE CHAIR SILBERMAN: And do you think that the threat of RIF constitutes coercion?

CHAIRMAN THOMAS: I think it constitutes reality.

VICE CHAIR SILBERMAN: I guess that's guidance.

CHAIRMAN THOMAS: I mean, that is reality. You're either gonna downsize voluntarily, or you are going to RIF across the board. Now, if you tell me that they focused the threat of the RIF on the older workers. Okay? Then I agree with you that that is a violation.

VICE CHAIR SILBERMAN: Well now, wait, wait, I agree with you.

UNIDENTIFIED COMMISSIONER: I don't think I have heard anything you have said that I disagree with.

CHAIRMAN THOMAS: But see, what I haven't is, I haven't seen, to me an offer of a sweetener, I haven't seen what is involuntary in this case, and I haven't seen where a threat was focused on the older workers.

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UNIDENTIFIED COMMISSIONER: Well, I am not sure they have made their case yet. I mean, this is a draft . . .

FINNEY: We have come to a point in the road where we talked to them--I think I'm talked out. The question of whether something like this is or is not coercive surely may be something for a settlement aside. But one of the things we looked at in terms of trying to analyze the worth of those packages was to even deal with the present value of what they were getting--they took the bridge to retirement and started to collect retirement benefits at age 55 as opposed to waiting to age 65.

It was our advice that the present value of money at age 65 was greater than the amount of money they were getting starting at age 55. In other words, there was no match up in terms of present value. So, in that context, if someone comes along and tells you that if you opt for a voluntary retirement, you might get "X"; if you wait for involuntary, you might get half of "X", and neither "X" nor half of "X" equals the present value of what you would have gotten at age 65, but you feel you have no choice, I think I would find that quite coercive.

CHAIRMAN THOMAS: I don't say that is coercive--that is reality. We are going to reduce our workforce. You can have this now, and go out, and there is no guarantee that you won't be RIFed. I don't understand . . .

FINNEY: I thought I was trying to address the question of sweeteners--what is a sweetener.

CHAIRMAN THOMAS: But that is reality. I mean, they're not offering these people involuntary. They are not giving them the voluntary plan for the fun of it. They are going to reduce the size of their workforce. They are going to reduce it by 2,000, and they only get 1,000 to take the voluntary plan--they got to reduce . . .

VICE CHAIR SILBERMAN: But, what if they don't reduce it, Clarence? What if they add on as this company did . . .

CHAIRMAN THOMAS: At the bottom.

VICE CHAIR SILBERMAN: . . . At the bottom, but many more people? Then I guess you really have to get a cost justification, I think. Because, if they are spending more money than they would have to keep these older people on, then I think you can draw an inference that they are targeting their older people--if you are spending more money. I mean, if cost is a justification, and you are spending more money, how can cost be a justification?

UNIDENTIFIED COMMISSIONER: Especially if they say they are worried about their maturing workforce.

CHAIRMAN THOMAS: They're not spending, well, if you want to cut your overhead, your overhead is not the people, it's what you pay the people. Okay?

VICE CHAIR SILBERMAN: And you have more people--it is a hell of a lot more expensive even though you are paying them less because your fringe benefits go up.

CHAIRMAN THOMAS: Well, that's not necessarily true. I mean, in the second round of RIF, we haven't been given anything, on the first round of RIFs. At least on the second round of RIFs, we have a New York Times article that says: yeah, we want to reduce it; that is going to save us $75 million.

VICE CHAIR SILBERMAN: Clarence [Thomas], I don't see that the New York Times article . . .

CHAIRMAN THOMAS: Well, I don't (several inaudible words). What else do we have? They have nothing else. God!

VICE CHAIR SILBERMAN: Well, all I am doing is saying that what we need, if, in order to do this, is that kind of evidence of pretext of intentional discrimination, not the fact that older people are disparately impacted; and that costs, involuntary and financial need, are synonymous. Because that is what we have got in the past, and that is not coercion.

UNIDENTIFIED COMMISSIONER: If there is an impact theory, I think it should be on the table, because some of us think there is impact under the Age Act.

VICE CHAIR SILBERMAN: And some of us don't. . .

(LAUGHTER)

VICE CHAIR SILBERMAN: You got a range of opinion here.

CHAIRMAN THOMAS: (several inaudible words) Okay. Thank you all. Anything else?

(UNIDENTIFIED MALE VOICE): No.

CHAIRMAN THOMAS: The meeting is adjourned.

Appendix III

Correspondence Pertaining to the Committee's Investigation of the EEOC and Hearing Conducted on September 10, 1987

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

July 30, 1987

The Honorable John Melcher
Chairman
Special Committee on Aging
United States Senate
730 Hart Senate Building
Washington, DC 20510

Dear Mr. Chairman:

This afternoon, the Equal Employment Opportunity Commission adopted a final rule to permit employees to sign waivers and releases of private rights under the Age Discrimination in Employment Act without EEOC supervision.

The Commission also voted to deny a petition for rulemaking filed by the Gray Panthers and Older Women's League, requesting that the Commission rescind an interpretive rule adopted in 1969 by the Department of Labor that bona fide apprenticeship programs are not subject to the ADEA.

Enclosed are copies of a news release announcing the Commission's action, the final rule pertaining to waivers and a letter responding to the petition for rulemaking.

If you or your staff would like more information on these actions, we would be pleased to provide it. To arrange a briefing, please call me at 634-6036.

Sincerely,

Deborah J. Graham

Deborah J. Graham
Director of Communications
and Legislative Affairs

Enclosures

JOHN MELCHER, MONTANA, CHAIRMAN

JOHN GLENN, OHIO
LAWTON CHILES, FLORIDA
DAVID PRYOR, ARKANSAS
BILL BRADLEY, NEW JERSEY
QUENTIN N. BURDICK, NORTH DAKOTA
J. BENNETT JOHNSTON, LOUISIANA
JOHN B. BREAUX, LOUISIANA
RICHARD SHELBY, ALABAMA
HARRY REID, NEVADA

JOHN HEINZ, PENNSYLVANIA
WILLIAM S. COHEN, MAINE
LARRY PRESSLER, SOUTH DAKOTA
CHARLES E. GRASSLEY, IOWA
PETE WILSON, CALIFORNIA
PETE V. DOMENICI, NEW MEXICO
JOHN H. CHAFEE, RHODE ISLAND
DAVE DURENBERGER, MINNESOTA
ALAN K. SIMPSON, WYOMING

MAX I. RICHTMAN, STAFF DIRECTOR
G. LAWRENCE ATKINS, MINORITY STAFF DIRECTOR

Copy

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

August 19, 1987

The Honorable Clarence Thomas
Chairman
The Equal Employment Opportunity Commission
Columbia Plaza, Room 500
2401 E Street, N.W.
Washington, D.C. 20507

Dear Chairman Thomas:

As Chairman of the Special Committee on Aging, I am writing to request that you and Vice Chairperson R. Gaull Silberman appear before the Committee on September 11, 1987 to provide testimony on the Equal Employment Opportunity Commission's (EEOC) progress in enforcing and administering the Age Discrimination in Employment Act (ADEA).

It would be most helpful if your testimony could address the following issues: the EEOC's efficiency and effectiveness in the processing and adjudication of age discrimination complaints; the EEOC's performance in administering the ADEA and in ensuring compliance with the Act; and the EEOC's rationale and justification for its recent adoption of rules to permit employee waivers and settlements of ADEA private rights without EEOC supervision and approval, and to exclude apprenticeship programs from ADEA coverage.

The hearing will begin at 10:00 a.m. on September 11, 1987 in room SD-628 of the Dirksen Senate Office Building. Please provide the Committee with ten copies of your testimony by close of business on September 8, 1987, and an additional 100 copies on the morning of September 10, 1987. Your testimony for submission into the record may be whatever length you deem appropriate. The Committee would, however, appreciate your limiting your oral presentation to not more than five minutes in order to permit adequate time for questions.

Should you have any questions regarding the hearing, please have your staff contact Max Richtman, Committee Staff Director, at 224-5364.

Thank you for your cooperation and assistance.

Sincerely,

John Melcher

JOHN MELCHER
Chairman

JM:jfm

JOHN MELCHER, MONTANA, CHAIRMAN

JOHN GLENN, OHIO
LAWTON CHILES, FLORIDA
DAVID PRYOR, ARKANSAS
BILL BRADLEY, NEW JERSEY
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JOHN H. CHAFEE, RHODE ISLAND
DAVE DURENBERGER, MINNESOTA
ALAN K. SIMPSON, WYOMING

MAX I. RICHTMAN, STAFF DIRECTOR
G. LAWRENCE ATKINS, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

August 25, 1987

The Honorable Clarence Thomas
Chairman
The Equal Employment Opportunity Commission
Columbia Plaza, Room 500
2401 E Street, N.W.
Washington, D.C. 20507

Dear Chairman Thomas:

As Chairman of the Special Committee on Aging, I am writing to request your assistance in the Committee's continuing inquiry into the Equal Employment Opportunity Commission's (EEOC) enforcement and administration of the Age Discrimination Employment Act (ADEA).

Specifically, I am requesting that Committee staff be provided full access to any and all documents and records pertaining to age discrimination complaint/case management and resolution received and generated by the EEOC and its staff. Committee staff will be contacting your staff to make arrangements for review of these documents and records. As Committee staff may wish to photocopy some of these materials for analysis, you have my personal assurance that any and all copies of these documents and records will receive appropriate treatment with regard to confidentiality.

Should you or your staff have any questions regarding my request, please have your staff contact James Michie of the Committee staff at 224-5364.

Thank you for your continuing cooperation and assistance in this important matter.

Sincerely,

John Melcher

JOHN MELCHER
Chairman

JM:jfm

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

September 1, 1987

The Honorable John Melcher
Chairman
Special Committee on Aging
Washington, D.C. 20510-6400

Dear Senator Melcher:

I wish to acknowledge receipt of your August 25, 1987 letter informing me of the Special Committee on Aging inquiry into the Equal Employment Opportunity Commission's enforcement and administration of the Age Discrimination in Employment Act.

In keeping with our established liaison procedures and to facilitate an organized response to your request for staff access to EEOC documents and records relative to age discrimination complaint/case management, please coordinate all information requests and personal staff visits to EEOC offices through Deborah Graham, Director of Communications and Legislative Affairs and/or Marcia Sayer, Director, Legislative Affairs Staff. Both can be reached at 634-6036. This central contact point for all requests from the Congress will enable us to be of greater assistance to you.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

JOHN MELCHER, MONTANA, CHAIRMAN

JOHN GLENN, OHIO
LAWTON CHILES, FLORIDA
DAVID PRYOR, ARKANSAS
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ALAN K. SIMPSON, WYOMING

MAX I. RICHTMAN, STAFF DIRECTOR
G. LAWRENCE ATKINS, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

September 3, 1987

The Honorable Clarence Thomas
Chairman
The Equal Employment Opportunity Commission
Columbia Plaza, Room 500
2401 E Street, N.W.
Washington, D.C. 20507

Dear Chairman Thomas:

As Chairman of the Special Committee on Aging, I am writing to request your assistance in the Committee's continuing inquiry into the Equal Employment Opportunity Commission's (EEOC) enforcement and administration of the Age Discrimination Employment Act (ADEA).

Specifically, I am requesting that the Committee be provided answers to the questions in the attached schedule. Please provide this information and data to the Committee by close of business on September 8, 1987.

Should you or your staff have any questions regarding my request, please have your staff contact James Michie of the Committee staff at 224-5364.

Thank you for your continuing cooperation and assistance in this important matter.

Sincerely,

John Melcher

JOHN MELCHER
Chairman

JM:jfm

SCHEDULE OF QUESTIONS TO THE EEOC PERTAINING TO AGE DISCRIMINATION IN EMPLOYMENT COMPLAINT/CASE MANAGEMENT AND RESOLUTION.

I. Please provide, for each of the fiscal years (1981 through June 1987) national totals for the following:

1. Age Discrimination in Employment Act (ADEA) charges filed;
2. ADEA charges that went to conciliation prior to EEOC investigation;
3. ADEA charges closed by successful conciliation prior to EEOC investigation;
4. ADEA charges closed by unsuccessful conciliation prior to EEOC investigation;
5. ADEA charges closed by the charging party's failure to cooperate prior to EEOC investigation;
6. ADEA charges closed by failure to locate the charging party/respondent prior to EEOC investigation;
7. ADEA charges investigated by EEOC following unsuccessful attempts at conciliation;

8. EEOC investigations of ADEA cases closed prior to completion;

9. ADEA charges successfully conciliated following EEOC investigation;

10. ADEA charges unsuccessfully conciliated following EEOC investigation;

11. ADEA single party charges resulting in EEOC letters of violation (LOV's) following EEOC investigation;

12. EEOC investigations of ADEA single party charges completed and not resulting in an EEOC letter of violation (LOV);

13. ADEA charges involving class actions and resulting in EEOC LOV's following EEOC investigation;

14. EEOC ADEA LOV's on single party charges resulting in EEOC staff recommendation for ADEA litigation;

15. EEOC ADEA LOV's involving class actions and resulting in EEOC staff recommendation for ADEA litigation;

16. EEOC ADEA LOV's on single party charges and not resulting in EEOC staff recommendation for ADEA litigation;

17. EEOC ADEA LOV's involving class actions and not resulting in EEOC staff recommendation for ADEA litigation;

18. EEOC staff recommendations for ADEA litigation involving single party charges and approved by the EEOC General Counsel for presentation to the Commission;

19. EEOC staff recommendations for ADEA litigation involving single party charges and disapproved by the EEOC General Counsel for presentation to the Commission;

20. EEOC staff recommendations for ADEA litigation involving class actions and disapproved by the EEOC General Counsel for presentation to the Commission;

21. EEOC staff recommendations for ADEA litigation involving class actions and approved by EEOC General Counsel for presentation to the Commission;

22. EEOC staff recommendations for ADEA litigation of single party charges and approved by the Commission;

23. EEOC staff recommendations for ADEA litigation involving class actions and approved by the Commission;

24. EEOC staff recommendations for ADEA litigation of single party charges and disapproved by the Commission;

25. EEOC staff recommendations for ADEA litigation involving class actions and disapproved by the Commission;

26. EEOC reversals on its prior decisions to approve ADEA litigation involving single party charges;

27. EEOC reversals on its prior decisions to approve ADEA litigation involving class actions;

28. EEOC reversals on its prior decisions to disapprove ADEA litigation involving single party charges:

29. EEOC reversals on its prior decisions to disapprove ADEA litigation involving class actions;

30. Co-filed Title VII/ADEA charges closed by successful conciliation/cause finding;

31. Co-filed Title VII/ADEA charges closed by no-cause determinations;

32. Co-filed Title VII/ADEA charges closed by unsuccessful conciliation

33. ADEA charges closed because of a lack of jurisdiction;

34. Co-filed Title VII/ADEA charges closed because of a a lack of jurisdiction;

35. ADEA charges closed after charging party indicated he/she would file suit;

36. ADEA charges closed after a class of charging parties indicated they would file suit;

37. ADEA charges closed after charging party filed suit;

38. ADEA charges closed after a class of charging parties filed suit;

39. Co-filed Title VII/ADEA charges closed after charging party indicated he/she would file suit;

40. Co-filed Title VII/ADEA charges closed after a class of charging parties indicated they would file suit;

41. Co-filed Title VII/ADEA charges after charging party filed suit;

42. Co-filed Title VII/ADEA charges after a class of charging parties filed suit;

43. Initiations of litigation in ADEA cases involving single party charges;

44. Initiations of litigation in ADEA cases involving class actions;

45. Initiations of litigation in Title VII/ADEA cases involving single party charges;

46. Initiations of litigation in Title VII/ADEA cases involving class actions;

47. ADEA single party cases which exceeded the two-year statute of limitations;

48. ADEA class action cases which exceeded the two-year statute of limitations;

49. Co-filed Title VII/ADEA single party cases which exceeded the two-year statute of limitations;

50. Co-filed Title VII/ADEA class action cases which exceeded the two-year statute of limitations;

51. ADEA single party cases which reached the age of 300 days, or older;

52. ADEA class action cases which reached the age of 300 days, or older;

53. Co-filed Title VII/ADEA single party cases which reached the age of 300 days, or older;

54. Co-filed Title VII/ADEA class action cases which reached the age of 300 days, or older;

55. ADEA single party cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987;

56. ADEA class action cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987;

57. Co-filed Title VII/ADEA single party cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987; and

58 Co-filed Title VII/ADEA class action cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987/

II. Please provide for each of the EEOC's District offices the percentage of 300 day old, or older, cases which is being allowed to each District Office Director at the close of fiscal year 1987 in order to meet or exceed his/her performance standards for fiscal year 1987.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

SEP 4 1987

The Honorable John Melcher
Chairman
Senate Special Committee on Aging
Washington, DC 20510

HAND DELIVERED

Dear Mr. Chairman:

I have received your letter, which was hand delivered in the late afternoon of September 3, listing 59 requests for information to be provided by the close of business September 8.

As you are aware, this timetable gives my staff two working days to research, prepare and provide this information for you, due to the Labor Day weekend September 5, 6 and 7. As you also are aware, we are making every effort to cooperate despite the short notice we received on the final hearing date of September 10.

Be assured that we will provide as much of the requested information as possible by the deadline, and will submit to you for the record as much of the remainder as is possible to compile as soon as we have it.

However, you and your colleagues should be aware that EEOC staff is approaching overload in attempting to respond to the enormous volume of requests for data and information from Members of Congress, Congressional committees and the General Accounting Office. Staff time which should be spent enforcing the laws against employment discrimination increasingly is being used to count, recount and compile data in every conceivable combination and permutation, and then prepare it in final form for presentation to the Congress or GAO.

EEOC's enforcement statistics are a matter of public record and we gladly provide the information we have available to anyone who asks. However, our statistics are maintained to assist our managers in efficiently tracking and managing our enforcement of the laws. We do not keep statistics in forms that are of no use to us and we do not manipulate data into every possible configuration simply for the sake of having it handy.

From your extensive request for data, it is difficult to determine exactly what it is that your committee really wants to know about EEOC's enforcement activities. If you would simply ask us what you want to know, we probably can provide the information in a form that already is available without wasting so much of your time and ours.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 8, 1987

The Honorable John Melcher
Chairman
Senate Special Committee on Aging
Washington, D.C. 20510

Dear Mr. Chairman:

Relative to your letter of September 3, 1987 to Chairman Clarence Thomas requesting information and/or response to 59 questions, I am providing you with the following summary as to the status of EEOC's response.

The Office of Program Operations provided statistical data for questions 1 through 11 for FY 85, FY 86 and FY 87. Prior to FY 85, statistical data was maintained by EEOC's Information System Services which will be providing where possible, the data from FY 81 through 84.

Questions 35 through 40 and questions 51 through 58 remain unanswered. Wherever possible, we will supply the remaining data through my office as soon as possible.

Responses to the following questions are attached: questions 1 through 11, questions 13 through 34 and questions 41 through 50.

I will be certain to see that the incomplete information is forwarded to your office as expeditiously as possible.

Sincerely,

Deborah J. Graham

Deborah J. Graham
Director
Office of Communications and
Legislative Affairs

cc: Chairman Clarence Thomas

Attachments

Response to questions on Enforcement of the Age Discrimination in Employment Act from the Senate Special Committee on Aging:

1. ADEA charges filed, FY 85 - 16,784, FY 86 - 17, 443, FY 87 - 10,886 (FY 87 through the third quarter).

2., 3 and 4. Data on 7 (d) conciliation attempts (We have interpreted your question to mean this.) Data on unsuccessful 7(d) conciliations was maintained until FY 85 when the EEOC Compliance Manual discontinued any reference to this type of closure. No data is known to exist which would identify a settlement as the result of a 7 (d) attampt. No data is maintained on the extent of the investigation at the time of a settlement.

5. and 6. OPO does not maintain data on the specific type of administrative closure nor on the extent of investigation at the time of closure.

7. OPO does not maintain data on investigations after unsuccessful 7(d) conciliation attempts.

8. We were not able to interpret this question.

9. Data on successful ADEA consilaitions from FY 85 to June 30, 1987: FY 85 - 101, FY 86 - 146, FY 87 - 59.

10. Unsuccessful ADEA conciliations FY 85 to June 30, 1987. See source for question 9. FY 85 - 449, FY 86 - 344, FY 87 - 438.

11 and 13. OPO does not maintain data on whether a charge is individual or class. Data on cause not maintained in OPO. Following figures represent the total of successful and unsuccessful conciliations. FY 85 - 550, FY 86 - 490, FY 87 - 497.

12. OPO does not maintain data on whether a charge is individual or class.

30. Successful conciliations of concurrent Title VII/ADEA charges. FY 85 - 10, FY 86 - 11, FY 87 - 5.

31. Concurrent Title VII/ADEA no cause. FY 85 - 1, 850, FY 86 - 2,258, FY 87 - 1,196

32. Concurrent Title VII/ADEA unsuccessful conciliations. FY 85 - 103, FY 86 - 40, FY 87 - 23.

33. and 34. Closures for lack of jurisdiction. FY 85 - 572, FY 86 - 451, data not yet available for FY 87.

41. and 42. Don't understand question.

QUESTIONS 14, 15, 16 and 17

These questions were interpreted to request the number of Presentation Memoranda submitted by the District Office legal units.

The responses to Questions 14, 15, 16 and 17 for FY 1981 through FY 1986 are contained in attached Table A.

The responses for FY 1987 are contained in Table A-1.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

TABLE A

PRESENTATION MEMORANDA SUBMITTED BY THE DISTRICT OFFICE LEGAL UNITS
ADEA RECOMMENDATIONS ONLY

	1986 (1)	1985 (2)	1984 (3)	1983 (4)	1982 (5)	1981 (6)
RECOMMENDATIONS TO LITIGATE	165	206	80	67	60	93
INDIVIDUAL	91	72	N/A	N/A	N/A	N/A
CLASS	57	134	N/A	N/A	N/A	N/A
BOTH	15	0	80	67	60	93
N/A	2	0	N/A	N/A	N/A	N/A
RECOMMENDATION NOT TO LITIGATE	16	12	//////////	//////////	//////////	//////////
INDIVIDUAL	11	8	//////////	//////////	//////////	//////////
CLASS	5	4	//////////	//////////	//////////	//////////
BOTH	0	0	//////////	//////////	//////////	//////////
N/A	0	0	//////////	//////////	//////////	//////////
TOTAL RECOMMENDATIONS	181	218	80	67	60	93
INDIVIDUAL	102	80	N/A	N/A	N/A	N/A
CLASS	62	138	N/A	N/A	N/A	N/A
BOTH	15	0	80	67	60	93
N/A	2	0	N/A	N/A	N/A	N/A

DATA WERE NOT MAINTAINED BY CLASS/INDIVIDUAL DESIGNATION PRIOR TO FY 1985, THEREFORE FY 1981 - 1984 DATA ARE LISTED AS "BOTH."

ALL RECOMMENDATIONS ARE CONSIDERED POSITIVE PRIOR TO THE SEPTEMBER 1984 ADOPTION OF THE STATEMENT OF ENFORCEMENT POLICY.

THESE DATA INCLUDE ALL IDENTIFIABLE TRO'S AND PR ACTIONS; HOWEVER, THEY DO NOT INCLUDE THOSE SUITS RECOMMENDED CONCURRENTLY UNDER MORE THAN ONE STATUTE.

PERCENTAGE CALCULATIONS

	1986	1985	1984	1983	1982	1981
RECOMMENDATIONS TO LITIGATE	91.2%	94.5%	100.0%	100.0%	100.0%	100.0%
INDIVIDUAL	55.2%	35.0%	N/A	N/A	N/A	N/A
CLASS	34.5%	65.0%	N/A	N/A	N/A	N/A
BOTH	9.1%	0.0%	N/A	N/A	N/A	N/A
N/A	1.2%	0.0%	100.0%	100.0%	100.0%	100.0%
RECOMMENDATION NOT TO LITIGATE	8.8%	5.5%	N/A	N/A	N/A	N/A
INDIVIDUAL	68.8%	66.7%	N/A	N/A	N/A	N/A
CLASS	31.3%	33.3%	N/A	N/A	N/A	N/A
BOTH	0.0%	0.0%	N/A	N/A	N/A	N/A
N/A	0.0%	0.0%	N/A	N/A	N/A	N/A
TOTAL RECOMMENDATIONS	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
INDIVIDUAL	56.4%	36.7%	N/A	N/A	N/A	N/A
CLASS	34.3%	63.3%	N/A	N/A	N/A	N/A
BOTH	8.3%	0.0%	N/A	N/A	N/A	N/A
N/A	1.1%	0.0%	100.0%	100.0%	100.0%	100.0%

Equal Employment Opportunity Commission
Office of General Counsel, ATSS
September 8, 1987

TABLE A-1

PRESENTATION MEMORANDA SUBMITTED BY THE DISTRICT OFFICE LEGAL UNITS
ADEA RECOMMENDATIONS ONLY
FY 1987 DATA AS OF SEPTEMBER 3, 1987

	1987 (1)
RECOMMENDATIONS TO LITIGATE	82
INDIVIDUAL	47
CLASS	32
BOTH	3
N/A	0
RECOMMENDATION NOT TO LITIGATE	18
INDIVIDUAL	12
CLASS	6
BOTH	0
N/A	0
TOTAL RECOMMENDATIONS	100
INDIVIDUAL	59
CLASS	38
BOTH	3
N/A	0

THESE DATA INCLUDE ALL IDENTIFIABLE TRO'S AND PR ACTIONS; HOWEVER, THEY DO NOT INCLUDE THOSE SUITS RECOMMENDED CONCURRENTLY UNDER MORE THAN ONE STATUTE.

PERCENTAGE CALCULATIONS

RECOMMENDATIONS TO LITIGATE	82.0%
INDIVIDUAL	57.3%
CLASS	39.0%
BOTH	3.7%
N/A	0.0%
RECOMMENDATION NOT TO LITIGATE	18.0%
INDIVIDUAL	66.7%
CLASS	33.3%
BOTH	0.0%
N/A	0.0%
TOTAL RECOMMENDATIONS	100.0%
INDIVIDUAL	59.0%
CLASS	38.0%
BOTH	3.0%
N/A	0.0%

Equal Employment Opportunity Commission
Office of General Counsel, ATSS
September 9, 1987

QUESTIONS 18, 19, 20 and 21

These questions were interpreted to request the number of General Counsel recommendations (positive and negative) to the Commission.

SPECIAL NOTE: Prior to enactment of the the Statement of Enforcement Policy (September 1984), the General Counsel did not submit negative recommendations to the Commission. Instead, the General Counsel did not submit the case for consideration by the Commission.

In order to provide continuity of the data, we have not used the General Counsel's recommendation, by Fiscal Year; but, rather, we have used the Fiscal Year in which the PM was received from the District Office.

The responses to Questions 18, 19, 20 and 21 for FY 1981 through FY 1986 are contained in attached Table B.

The responses for FY 1987 are contained in Table B-1.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

TABLE B

OFFICE OF GENERAL COUNSEL ACTION ON POSITIVE PRESENTATION MEMORANDA SUBMITTED BY THE DISTRICT OFFICE LEGAL UNITS
ADEA RECOMMENDATIONS ONLY

	1986 (1)	1985 (2)	1984 (3)	1983 (4)	1982 (5)	1981 (6)
OGC POSITIVE RECOMMENDATIONS	113	149	68	30	28	53
INDIVIDUAL	74	51	N/A	N/A	N/A	N/A
CLASS	28	98	N/A	N/A	N/A	N/A
BOTH	11	0	68	30	28	53
OGC NEGATIVE RECOMMENDATIONS	48	31	15	23	27	10
INDIVIDUAL	17	17	N/A	N/A	N/A	N/A
CLASS	25	14	N/A	N/A	N/A	N/A
BOTH	6	0	15	23	27	10
OGC RECOMMEND RETURN TO DO				13	1	3
INDIVIDUAL	-	-	-	N/A	N/A	N/A
CLASS	-	-	-	N/A	N/A	N/A
BOTH	-	-	-	13	1	3
TOTAL, ALL ACTIONS	161	180	83	66	56	66
PERCENTAGE CALCULATIONS						
OGC POSITIVE RECOMMENDATIONS	70.2%	82.8%	81.9%	45.5%	50.0%	80.3%
INDIVIDUAL	65.5%	34.2%	N/A	N/A	N/A	N/A
CLASS	24.8%	65.8%	N/A	N/A	N/A	N/A
BOTH	9.7%	0.0%	100.0%	100.0%	100.0%	100.0%
OGC NEGATIVE RECOMMENDATIONS	29.8%	17.2%	18.1%	34.8%	48.2%	15.2%
INDIVIDUAL	35.4%	54.8%	N/A	N/A	N/A	N/A
CLASS	52.1%	45.2%	N/A	N/A	N/A	N/A
BOTH	12.5%	0.0%	100.0%	100.0%	100.0%	100.0%
OGC RECOMMEND RETURN TO DO	N/A	N/A	N/A	19.7%	1.8%	4.5%
INDIVIDUAL	N/A	N/A	N/A	N/A	N/A	N/A
CLASS	N/A	N/A	N/A	N/A	N/A	N/A
BOTH	N/A	N/A	N/A	100.0%	100.0%	100.0%

DATA WERE NOT MAINTAINED BY CLASS/INDIVIDUAL DESIGNATION PRIOR TO FY 1985, THEREFORE, FY 1981 - 1984 DATA ARE LISTED AS "BOTH."

NOTE: PRIOR TO THE STATEMENT OF ENFORCEMENT POLICY, THE GENERAL COUNSEL DID NOT RECOMMEND NEGATIVE SUITS. INSTEAD, THE GENERAL COUNSEL DID NOT SUBMIT THE SUIT TO THE COMMISSION FOR LITIGATION CONSIDERATION.

NOTE: IN FY 1983, THIRTEEN SUITS WERE RETURNED TO THE ORIGINATING OFFICE FOR RECONSIDERATION IN ACCORDANCE WITH OGC'S PROCEDURES FOR RECOMMENDING AND LITIGATING ADEA BFOQ, PUBLIC SAFETY CASES.

Equal Employment Opportunity Commission
Office of General Counsel, ATSS
September 8, 1987

Date Table Last Updated: 09/08/87

TABLE B-1

OFFICE OF GENERAL COUNSEL ACTION ON POSITIVE PRESENTATION MEMORANDA
SUBMITTED BY THE DISTRICT OFFICE LEGAL UNITS
ADEA RECOMMENDATIONS ONLY
AS OF SEPTEMBER 3, 1987

	1987 (1)
OGC POSITIVE RECOMMENDATIONS	56
INDIVIDUAL	31
CLASS	23
BOTH	2
OGC NEGATIVE RECOMMENDATIONS	16
INDIVIDUAL	10
CLASS	5
BOTH	1
OGC RECOMMEND RETURN TO DO	
INDIVIDUAL	-
CLASS	-
BOTH	-
TOTAL, ALL ACTIONS	72
PERCENTAGE CALCULATIONS	
OGC POSITIVE RECOMMENDATIONS	77.8%
INDIVIDUAL	55.4%
CLASS	41.1%
BOTH	3.6%
OGC NEGATIVE RECOMMENDATIONS	22.2%
INDIVIDUAL	62.5%
CLASS	31.3%
BOTH	6.3%
OGC RECOMMEND RETURN TO DO	N/A
INDIVIDUAL	N/A
CLASS	N/A
BOTH	N/A

Equal Employment Opportunity Commission
Office of General Counsel, ATSS
September 8, 1987

QUESTIONS 22, 23, 24 and 25

These questions were interpreted to request the number of Suits approved/disapproved by the Commission.

SPECIAL NOTE: In order to provide continuity of the data, we have not used the Commission's vote, by Fiscal Year; but, rather, we have used the Fiscal Year in which the PM was received from the District Office.

The responses to Questions 22, 23, 24 and 25 for FY 1981 through FY 1986 are contained in attached Table C.

The responses for FY 1987 are contained in Table C-1.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

NOTE: THIS TABLE IS STILL IN PRODUCTION IN OGC. IT WILL BE AVAILABLE 9/9/87

QUESTIONS 26, 27, 28 and 29

The Office of General Counsel is working on the response to these questions.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

QUESTIONS 43 and 44

These questions were interpreted to request the number of class and individual suits filed under the ADEA.

The responses to Questions 43 and 44 for FY 1981 through FY 1986 are contained in attached Table D.

The responses for FY 1987 are contained in attached Table D-1.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

TABLE D

TOTAL NUMBER OF ADEA AND ADEA/CONCURRENT SUITS FILED BY FISCAL YEAR, FY 1981 - FY 1985

	1986 (1)	1985 (2)	1984 (3)	1983 (4)	1982 (5)	1981 (6)
ADEA SUITS FILED	95	96	63	33	26	89
INDIVIDUAL SUITS	45	25	14	10	9	42
CLASS SUITS	50	71	49	23	17	47
ADEA/TITLE VII SUITS FILED	22	1	1	2	0	0
INDIVIDUAL SUITS	10	1	0	1	0	0
CLASS SUITS	12	0	1	1	0	0
ADEA/TITLE VII/EPA SUITS FILED	1	2	0	0	0	1
INDIVIDUAL SUITS	1	1	0	0	0	1
CLASS SUITS	0	1	0	0	0	0
TOTAL ADEA AND ADEA-CONCURRENT SUITS FILED	118	99	64	35	26	90
INDIVIDUAL SUITS	56	27	14	11	9	43
CLASS SUITS	62	72	50	24	17	47

PERCENTAGE CALCULATIONS

	1986 (1)	1985 (2)	1984 (3)	1983 (4)	1982 (5)	1981 (6)
ADEA SUITS FILED	80.51%	96.97%	98.44%	94.29%	100.00%	98.89%
INDIVIDUAL SUITS	47.37%	26.04%	22.22%	30.30%	34.62%	47.19%
CLASS SUITS	52.63%	73.96%	77.78%	69.70%	65.38%	52.81%
ADEA/TITLE VII SUITS FILED	18.64%	1.01%	1.56%	5.71%	0.00%	0.00%
INDIVIDUAL SUITS	45.45%	100.00%	0.00%	50.00%	N/A	N/A
CLASS SUITS	54.55%	0.00%	100.00%	50.00%	N/A	N/A
ADEA/TITLE VII/EPA SUITS FILED	0.85%	2.02%	0.00%	0.00%	0.00%	1.11%
INDIVIDUAL SUITS	100.00%	50.00%	N/A	N/A	N/A	100.00%
CLASS SUITS	0.00%	50.00%	N/A	N/A	N/A	0.00%
TOTAL SUITS FILED	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
INDIVIDUAL SUITS	47.46%	27.27%	21.88%	31.43%	34.62%	47.78%
CLASS SUITS	52.54%	72.73%	78.13%	68.57%	65.38%	52.22%

SOURCE: Descriptive Lists of Suits Filed Under the ADEA, FY 1981 through FY 1985
Administrative and Technical Services Staff
Office of General Counsel
Equal Employment Opportunity Commission

TABLE D-1

TOTAL NUMBER OF ADEA AND ADEA/CONCURRENT SUITS FILED
FY 1987 (AS OF JUNE 30, 1987)

	1987
	(1)
ADEA SUITS FILED	46
INDIVIDUAL SUITS	28
CLASS SUITS	16
ADEA/TITLE VII SUITS FILED	2
INDIVIDUAL SUITS	1
CLASS SUITS	1
ADEA/TITLE VII/EPA SUITS FILED	0
INDIVIDUAL SUITS	0
CLASS SUITS	0
TOTAL ADEA AND ADEA-CONCURRENT SUITS FILED	48
INDIVIDUAL SUITS	29
CLASS SUITS	17

PERCENTAGE CALCULATIONS

	1986
	(1)
ADEA SUITS FILED	95.83%
INDIVIDUAL SUITS	60.87%
CLASS SUITS	34.78%
ADEA/TITLE VII SUITS FILED	4.17%
INDIVIDUAL SUITS	50.00%
CLASS SUITS	50.00%
ADEA/TITLE VII/EPA SUITS FILED	0.00%
INDIVIDUAL SUITS	N/A
CLASS SUITS	N/A
TOTAL SUITS FILED	100.00%
INDIVIDUAL SUITS	60.42%
CLASS SUITS	35.42%

Equal Employment Opportunity Commission
Office of General Counsel, ATSS

QUESTIONS 45 and 46

These questions were interpreted to request the number of class and individual suits filed concurrently under more than one statute.

The responses to Questions 45 and 46 for FY 1981 through FY 1986 are contained in attached Table D.

The responses for FY 1987 are contained in Attached Table D-1.

In Fiscal Year 1986, approximately one-half of the class suits filed under the ADEA challenged mandatory retirement age and maximum hiring age policies of public safety employers.

The number of such cases, and thus the number of class ADEA cases, declined in FY 1987 because the 1986 Amendments to the ADEA authorized continuation of most such mandatory retirement and maximum hiring age policies until 1991.

In FY 1987, the data reflect only the first three quarters of the Fiscal Year or through September 3, 1987, as specified.

QUESTION 47

SPECIAL COMMENT: Complete data are available only for FY 1986, the first year in which the 2-year vs. 3-year limitations period became a problem because of Court decisions.

RESPONSE: 31

NOTE: Prior to Fiscal Year 1986, it had been standard practice to rely on the three-year statute of limitations for willful violations because courts had held that a willful violation for limitation purposes occurs whenever a court finds that an employer was aware that it might be subject to the ADEA. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir., 1971), cert denied, 409 U.S. 948 (1972). However, following the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the possibility arose that the standard for determining willfulness for limitations purposes would be the same as the standard for determining willfulness for liquidated damages purposes. This issue has not yet been resolved by the Supreme Court and many courts of appeals still use the Jiffy June rule for determining willfulness.

For reasons of prudence and sound management, however, the Commission and the Office of General Counsel have continuously directed field staff to recommend and to file ADEA cases prior to the expiration of the two-year statute of limitations for non-willful violations.

QUESTION 48

SPECIAL COMMENT: Complete data are available only for FY 1986, the first year in which the 2-year vs. 3-year limitations period became a problem because of Court decisions.

RESPONSE: 35

NOTE: Prior to Fiscal Year 1986, it had been standard practice to rely on the three-year statute of limitations for willful violations because courts had held that a willful violation for limitation purposes occurs whenever a court finds that an employer was aware that it might be subject to the ADEA. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir., 1971), cert denied, 409 U.S. 948 (1972). However, following the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the possibility arose that the standard for determining willfulness for limitations purposes would be the same as the standard for determining willfulness for liquidated damages purposes. This issue has not yet been resolved by the Supreme Court and many courts of appeals still use the Jiffy June rule for determining willfulness.

For reasons of prudence and sound management, however, the Commission and the Office of General Counsel have continuously directed field staff to recommend and to file ADEA cases prior to the expiration of the two-year statute of limitations for non-willful violations.

QUESTION 49

SPECIAL COMMENT: Complete data are available only for FY 1986, the first year in which the 2-year vs. 3-year limitations period became a problem because of Court decisions.

RESPONSE: 3

NOTE: Prior to Fiscal Year 1986, it had been standard practice to rely on the three-year statute of limitations for willful violations because courts had held that a willful violation for limitation purposes occurs whenever a court finds that an employer was aware that it might be subject to the ADEA. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir., 1971), cert denied, 409 U.S. 948 (1972). However, following the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the possibility arose that the standard for determining willfulness for limitations purposes would be the same as the standard for determining willfulness for liquidated damages purposes. This issue has not yet been resolved by the Supreme Court and many courts of appeals still use the Jiffy June rule for determining willfulness.

For reasons of prudence and sound management, however, the Commission and the Office of General Counsel have continuously directed field staff to recommend and to file ADEA cases prior to the expiration of the two-year statute of limitations for non-willful violations.

QUESTION 50

SPECIAL COMMENT: Complete data are available only for FY 1986, the first year in which the 2-year vs. 3-year limitations period became a problem because of Court decisions.

RESPONSE: 1

NOTE: Prior to Fiscal Year 1986, it had been standard practice to rely on the three-year statute of limitations for willful violations because courts had held that a willful violation for limitation purposes occurs whenever a court finds that an employer was aware that it might be subject to the ADEA. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir., 1971), cert denied, 409 U.S. 948 (1972). However, following the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the possibility arose that the standard for determining willfulness for limitations purposes would be the same as the standard for determining willfulness for liquidated damages purposes. This issue has not yet been resolved by the Supreme Court and many courts of appeals still use the Jiffy June rule for determining willfulness.

For reasons of prudence and sound management, however, the Commission and the Office of General Counsel have continuously directed field staff to recommend and to file ADEA cases prior to the expiration of the two-year statute of limitations for non-willful violations.

FY-87 RATING SCALE FOR DISTRICT DIRECTOR'S 300-DAY OLD CHARGES

9/4/87

District Offices Field Management	Minimally Satisfactory %	Fully Successful %	Highly Effective %
Atlanta	6	4	2
Baltimore	6	4	2
Birmingham	6	4	2
Charlotte	6	4	2
Cleveland	6	4	2
*Detroit			
Memphis	14	10	6
Miami	10	8	3
New Orleans	6	4	2
New York	17	10	3
*Philadelphia			
Chicago	14	10	6
Dallas	14	10	6
Denver	10	6	4
Houston	6	4	2
*Indianapolis			
Los Angeles	22	18	14
Milwaukee	8	5	2
Phoenix	6	4	2
San Antonio	6	4	2
San Francisco	6	4	2
Seattle	6	4	2
St. Louis	14	10	6

* There ~~are~~ was no ~~SES~~ permanent ~~D~~irector~~s~~ on-board in these district offices

REVISED SCHEDULE OF QUESTIONS FOR THE EEOC PERTAINING TO AGE DISCRIMINATION IN EMPLOYMENT COMPLAINT/CASE MANAGEMENT AND RESOLUTION.

I. Please provide, for each of the fiscal years (1981 through 1987) totals for each of the EEOC's 23 districts and EEOC Headquarters:

1. Age Discrimination in Employment Act (ADEA) charges filed;
2. ADEA charge closures;
3. ADEA charges closed by negotiated settlements;
4. ADEA charges closed by withdrawals with benefits;
5. ADEA charges closed by successful conciliations;
6. ADEA charges closed by no cause/no violation;
7. ADEA charges closed by unsuccessful conciliation;
8. ADEA charges closed administratively (please list totals by each category of administrative closure);
9. EEOC investigations of ADEA cases closed prior to completion;
10. ADEA charges resulting in EEOC letters of violation (LOVs) following EEOC investigation;
11. ADEA LOVs resulting in EEOC staff recommendation for ADEA litigation;
12. ADEA LOVs not resulting in EEOC staff recommendation for ADEA litigation;
13. EEOC staff recommendations for ADEA litigation which were approved by the EEOC General Counsel for presentation to the Commission;
14. EEOC staff recommendations for ADEA litigation which were disapproved by the EEOC General Counsel for presentation to the Commission;
15. ADEA litigation of single/multiple party charges recommended by EEOC General Counsel and approved by the Commission;
16. ADEA litigation of class actions recommended by EEOC General Counsel and approved by the Commission;
17. ADEA litigation of single/multiple party charges recommended by EEOC General Counsel and disapproved by the Commission;
18. ADEA litigation of class actions recommended by EEOC General Counsel and disapproved by the Commission;
19. Commission reversals on its prior decisions to approve ADEA litigation involving single/multiple party charges;
20. Commission reversals on its prior decisions to approve ADEA litigation involving class actions;
21. Commission reversals on its prior decisions to disapprove ADEA litigation involving single/multiple party charges;
22. Commission reversals on its prior decisions to disapprove ADEA litigation involving class actions;
23. ADEA charges closed because of a lack of jurisdiction;
24. ADEA charges closed after charging party/parties indicated he/she/they would file suit;

25. ADEA charges closed after charging party/parties filed suit;

26. Initiations of litigation in ADEA cases involving single/multiple party charges;

27. Initiations of litigation in ADEA cases involving class actions;

28. ADEA single/multiple party cases which exceeded the two-year statute of limitations prior to EEOC staff recommendation to EEOC General Counsel concerning litigation;

29. ADEA single/multiple party cases which exceeded the two-year statute of limitations prior to EEOC General Counsel recommendation (concerning litigation) to the Commission;

30. ADEA single/multiple party cases which exceeded the three-year statute of limitations prior to EEOC staff recommendation to EEOC General Counsel concerning litigation;

31. ADEA single/multiple party cases which exceeded the three-year statute of limitations prior to EEOC General Counsel recommendation (concerning litigation) to the Commission;

32. ADEA class action cases which exceeded the two-year statute of limitations prior to EEOC staff recommendation to EEOC General Counsel concerning litigation;

33. ADEA class action cases which exceeded the two-year statute of limitations prior to EEOC General Counsel recommendation (concerning litigation) to the Commission;

34. ADEA class action cases which exceeded the three-year statute of limitations prior to EEOC staff recommendation to EEOC General Counsel concerning litigation;

35. ADEA class action cases which exceeded the three-year statute of limitations prior to EEOC General Counsel recommendation (concerning litigation) to the Commission;

36. ADEA single/multiple party cases which reached the age of 300 days, or older (since the date on which the charge was filed);

37. ADEA single/multiple party cases which reached the age of 500 days or older (since the date on which the charge was filed);

38. ADEA class action cases which reached the age of 300 days, or older;

39. ADEA class action cases which reached the age of 500 days, or older;

40. ADEA single/multiple party cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987;

41. ADEA single/multiple party cases which will have reached the age of 500 days, or older, by the end of fiscal year 1987;

42. ADEA single/multiple party cases which will have reached the age of 730 days, or older, by the end of fiscal year 1987;

43. ADEA single/multiple party cases which will have reached the age of 1,095 days, or older, by the end of fiscal year 1987;

44. ADEA class action cases which will have reached the age of 300 days, or older, by the end of fiscal year 1987;

45. ADEA class action cases which will have reached the age of 730 days, or older, by the end of fiscal year 1987;

46. ADEA class action cases which will have reached the age of 1,095 days, or older, by the end of fiscal year 1987; and

II. Please provide for each of the EEOC's District offices the percentage of 300 day old, or older, cases which is being allowed to each District Office Director at the close of fiscal year 1987 in order to meet or exceed his/her performance standards for fiscal year 1987.

[NOTE: This list of questions, which was presented to the EEOC on September 16, 1987, is a revision of the questions submitted to the EEOC by Senator Melcher on September 3, 1987. The September 16, 1987 list of questions contains revisions suggested by EEOC staff during several meetings with staff of the Special Committee on aging.]

JOHN MELCHER, MONTANA, CHAIRMAN

JOHN GLENN, OHIO
LAWTON CHILES, FLORIDA
DAVID PRYOR, ARKANSAS
BILL BRADLEY, NEW JERSEY
QUENTIN N. BURDICK, NORTH DAKOTA
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RICHARD SHELBY, ALABAMA
HARRY REID, NEVADA

JOHN HEINZ, PENNSYLVANIA
WILLIAM S. COHEN, MAINE
LARRY PRESSLER, SOUTH DAKOTA
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PETE V. DOMENICI, NEW MEXICO
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MAX I. RICHTMAN, STAFF DIRECTOR
G. LAWRENCE ATKINS, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, DC 20510-6400

September 21, 1987

The Honorable Clarence Thomas
Chairman
U.S. Equal Employment Opportunity Commission
Columbia Plaza - Room 500
2401 E Street, N.W.
Washington, D.C. 20507

Dear Chairman Thomas:

Thank you for appearing before the Senate Special Committee on Aging on September 10 and testifying about the Age Discrimination in Employment Act. Your testimony was helpful and we appreciated having the benefit of your views.

Due to time constraints during the hearing, I was unable to raise as many questions as I would have liked. Because I believe they are important, I would like to request your cooperation in answering the attached questions. Also attached are several questions which Senators Wilson and Grassley were unable to ask during the hearing.

The Aging Committee is keeping the hearing record open and will be placing our follow-up questions and your answers in our print of the hearing's proceedings. It is our intention to submit these additions to the record by Friday, October 2, 1987. Therefore, we request that you relay your answers to the attached questions prior to that date. Once the hearing print is published, we will be sure to send you a copy.

Your continued cooperation in this matter is appreciated and we look forward to your responses.

Best regards.

Sincerely,

John Melcher
Chairman

QUESTIONS FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FROM SENATOR JOHN MELCHER

A. WORKFORCE REDUCTIONS AND EARLY RETIREMENT PROGRAMS:

(1) What is the Commission's existing policy regarding workforce reductions and early retirement programs as these may relate to age discrimination in employment? When did the Commission establish existing policy? What was the basis for establishing this policy? Does existing policy represent a change from previous policy and, is so, why was the policy changed, what was the previous policy, when was it established, and what was the basis for the previous policy? Please provide any and all documentation supportive of the answers to these questions.

(2) Does the Commission currently have in place clear and settled policy regarding workforce reductions and early retirement programs as these may relate to age discrimination in employment and, if not, why has the Commission not yet established such policy?

(3) Is existing policy as yet unclear and unsettled and, if so, when does the Commission intend to formulate and establish clear and settled policy?

(4) Did the Commission's disapproval this past March of the Office of General Counsel recommendation for litigation in the Xerox case follow policy that existed at that time regarding workforce reductions and early retirement programs? If so, define that policy as it relates to the Commission's decision on Xerox.

(5) Did the Commission's disapproval of litigation in the Xerox case establish new policy regarding workforce reductions and early retirement programs? If so, what was the policy established, and how does it differ from previous policy?

(6) EEOC regulation at 29 CFR 1625.7(f) establishes that a defense of economic necessity cannot be used by employers to justify terminating older workers. Nonetheless, during the Commission's meeting on March 16, 1987 at which the Office of General Counsel presented its recommendation to pursue age discrimination litigation against Xerox, you stated:

"Getting rid of higher-priced employees who happen to be older is not a violation of the Act. . . This is a common business practice. If we hold against Xerox, then we'll have to go after everyone else." What are the legal and regulatory bases for these opinions which you voiced at the March 16 meeting? Do these opinions constitute Commission policy and, if so, when was this policy established? Please provide any and all documentation supportive of your answers to these questions.

(7) During that same March 16, 1987 Commission meeting, you stated during the discussion of the Xerox case: "These voluntary reductions-in-force, which are always going to be directed at senior employees, are not violative of the Act unless you can prove coercion." When asked by Associate General Counsel James Finney, "Wouldn't a threat of an involuntary reduction in force constitute coercion?", you responded, "No, it constitutes reality." Please explain what you meant by stating that "it constitutes reality." What are the legal and regulatory bases for your opinion that the "threat of an involuntary reduction in force" constitutes "reality" and not "coercion"? Please provide any and all documentation supportive of your answers to these questions.

(8) In light of your opinions expressed at the March 16 meeting regarding the Xerox case, please describe what, in your opinion, would constitute coercion in workforce reductions and early retirement programs affecting older workers, and what would have satisfied your definition of coercion in the Xerox case.

(9) You stated in testimony before the Committee on September 10, 1987 that, when the Office of General Counsel presented the Xerox case to the Commission for consideration on March 16, 1987, General Counsel "provided no evidence" to support its recommendation for litigation in the Xerox case. Later, upon examining documents from the Commission's Xerox case files, I found that you and the other Commissioners had been provided, or had been made aware of, the following: internal EEOC staff memoranda establishing that, since 1984, when EEOC opened its investigation of Xerox, the company had continued to withhold information and data essential to the EEOC investigation and had misrepresented computer data

it had furnished for a period of six months; and statistical analyses, testimony from former Xerox officials, copies of internal Xerox memos, and interviews from more than 50 former Xerox employees which "showed compelling evidence of a pattern of deliberate age discrimination" by Xerox officials. What were the legal and regulatory bases for your having discounted these materials and information as evidence? Please provide any and all documentation supportive of your answer to this question.

B. DELAYS IN EEOC LITIGATION OF ADEA CASES:

(10) According to a August 18, 1987 memorandum from Charles Shanor, EEOC General Counsel, to all EEOC District Directors and Regional Attorneys, "[A] significant number of age cases being forwarded to the Commission for approval for litigation have statute of limitations problems. Over one-third of all PMs submitted involve cases that are beyond the two year statute of limitations. A number of cases recently submitted were beyond the three year statute of limitations." As of August 18, 1987, what was the actual number of cases that had run the two year statute of limitations? How many cases had been submitted beyond the three year statute of limitations?

(11) What were the causes for the delays in submitting the presentation memoranda, and how do the delays described in the General Counsel's August 18, 1987 memo compare with such delays in 1986, 1985, 1984, and 1983?

(12) Is it the policy of the Commission to inform complaintants of the running of these statutes, and if so, were all the complaintants involved in the cases referred to in the General Counsel's August 18, 1987 memo notified prior to the running of the statutes of limitations? How were they notified, by telephone or in writing?

C. WAIVERS OF RIGHTS UNDER ADEA

(13) During the hearing, we discussed the Commission's recent rule regarding waivers of rights under the ADEA. The Commission has consistently contended that for any waiver to be valid, it must be "knowing and voluntary" on the part of the employee. Would you please explain for the record the criteria to be used in determining whether such a waiver has, in fact, been made knowingly and voluntarily? Who will bear the burden of proving that such waivers were not made voluntarily? Would you please explain why this is the case? Does this represent a shift in the burden of proof from the past? Why or why not?

D. STAFFING REQUESTS AND VACANCIES

(14) During the hearing, we discussed your Fiscal Year 1988 staff request. We also discussed the fact that you presently have several staff vacancies in your Systemic Litigation Services division of the Office of General Council. While I agree that additional staff is needed, would you please explain to me why Congress should grant your staffing request given the fact that you presently have so many vacancies which need filling? How soon do you plan to fill these vacancies?

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

[illegible] SEP 23 [illegible] 5:21

Craig

September 23, 1987

Mr. Max Richtman
Staff Director
Special Committee on Aging
G-32 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6400

Dear Max:

Relative to our conversation of September 22, 1987 regarding the date of closure for the official hearing record of the September 10th hearing on "EEOC's Administration and Enforcement of ADEA," I am reconfirming our discussion in writing. As we discussed, the record will remain open through close of business October 2, 1987.

We will complete our response to the questions received from Senator Heinz, return EEOC's portion of the hearing transcript, and provide the additional comments and clarification Vice Chairman Silberman made reference to in her remarks to Senator Melcher.

Thank you for your assistance in this matter.

Sincerely,

Marcia Sayer

Marcia Sayer
Director of Legislative
Affairs Staff

cc: Chairman Thomas
Vice Chairman Silberman
Deborah J. Graham

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

OCT 2 1987

The Honorable John Melcher
Chairman
Special Committee on Aging
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of September 21, 1987, posing additional questions to be included in the record of the September 10 hearing before the Senate Special Committee on Aging regarding EEOC's enforcement of the Age Discrimination in Employment Act.

QUESTION 1:

What is the Commission's existing policy regarding workforce reductions and early retirement programs as these may relate to age discrimination in employment? When did the Commission establish existing policy? What was the basis for establishing this policy? Does existing policy represent a change from previous policy and, if so, why was the policy changed, what was the previous policy, when was it established, and what was the basis for the previous policy? Please provide any and all documentation supportive of the answers to these questions.

ANSWER:

EEOC's enforcement takes a two-pronged approach: conciliation and litigation. Policy is established by the Commission through regulation, which then is implemented in its enforcement process. However, as in the case of Cipriano v. Board of Education, No. 84-CV-80C, United States District Court for the Western District of New York, EEOC through its litigation arm may find it necessary to take a position in the courts before the issue has been addressed through the regulatory process. The Commission is called upon to look at an issue within the narrow facts of the case. Such positions have policy implications and certainly may be looked to for guidance; they do not establish Commission policy.

The EEOC's legal position in Cipriano regarding workforce reductions and early retirement programs has been set forth in its July 31, 1987 Memorandum of Law as Amicus Curiae (a copy of the Memorandum is attached). The EEOC, on request from the Court of Appeals for the Second Circuit, developed its position after a period of intensive study of the legal and policy issues involved. The position developed in the Memorandum is based upon an analysis of the ADEA and its legislative history and of the court decisions in the employee benefits area with regard to the question asked by the court.

The early retirement issue is a relatively recent legal concern. Consequently, the position taken by the EEOC in Cipriano is newly developed, rather than a change from any established policy. It should be noted that the Commission has always considered and still considers coerced early retirement to be a violation of section 4(a)(1) of the ADEA. Similarly, it has always been and it remains the Commission's position that decisions concerning workforce reductions cannot be based upon age.

As in all areas of the law, the Commission is constantly examining its positions in light of case law, statutory changes, and any other relevant factors. We are currently reviewing the new section 4(i) of the ADEA to determine the effect of the section upon such areas as early retirement. If appropriate, the regulatory guidance under section 4(i) will analyze early retirement programs.

QUESTION 2:

Does the Commission currently have in place clear and settled policy regarding workforce reductions and early retirement programs as these may relate to age discrimination in employment and, if not, why has the Commission not yet established such policy?

ANSWER:

See answer to #1.

QUESTION 3:

Is existing policy as yet unclear and unsettled and, if so, when does the Commission intend to formulate and establish clear and settled policy?

ANSWER:

See answer to #1.

QUESTION 4:

Did the Commission's disapproval this past March of the Office of General Counsel recommendation for litigation in the Xerox case follow policy that existed at that time regarding workforce reductions and early retirement programs? If so, define that policy as it relates to the Commission's decision on Xerox.

ANSWER:

All litigation decisions are made by the Commission on a case by case basis. The Commission's consideration of the proposed Xerox case did not depart from any established policy. At the time the Xerox case was considered, the Commission had not expressed any views with respect to the legality of early retirement programs and the General Counsel had not yet filed the brief amicus curiae in Cipriano.

The litigation decision in the Xerox case was based on an analysis of the facts in that proposed case, made by each member of the Commission. We note that the Commission has initiated litigation in workforce reductions cases where, after examining the facts of a particular case, a majority of the Commission believed that there was sufficient evidence to establish ADEA violations.

QUESTION 5:

Did the Commission's disapproval of litigation in the Xerox case establish new policy regarding workforce reductions and early retirement programs? If so, what was the policy established, and how does it differ from previous policy?

ANSWER:

All litigation decisions are made by the Commission on a case by case basis. Therefore the litigation decision in Xerox was based on an analysis of the facts in that proposed case, made by each member of the Commission. Such decisions made on the basis of the specific and unique facts of a specific case do not establish policy.

QUESTIONS 6 THROUGH 9:

Due to deliberative privilege as provided in the Government in the Sunshine Act, answers to questions 6 through 9 are submitted to the Committee under separate cover and should not be printed as part of the public hearing record.

QUESTION 10:

According to a August 18, 1987 memorandum from Charles Shanor, EEOC General Counsel, to all EEOC District Directors and Regional Attorneys, "[A] significant number of age cases being forwarded to the Commission for approval for litigation have statute of limitations problems. Over one-third of all PMs submitted involve cases that are beyond the three year statute of limitations." As of August 18, 1987, what was the actual number of cases that had run the two year statute of limitations? How many cases had been submitted beyond the three year statute of limitations?

ANSWER:

Initially, we wish to point out that unlike a private litigant, the Commission is required to investigate alleged ADEA violations and attempt to conciliate ADEA claims before considering litigation. (Sections 7(b)(d), 29 U.S.C. Section 626(b)(d).) The process of investigating and fully conciliating a charge can be quite time consuming. The private litigant, in contrast, only needs to wait 60 days from the filing of a charge to file his or her own private action. (Section 7(d), 29 U.S.C. Section 626(d).)

The ADEA, through its incorporation of relevant provisions of the Fair Labor Standards Act, provides for a two year statute of limitations. However, the statute of limitations is three years for "willful" violations. Until 1986, all circuit courts that had been called upon to define the term "willful" for statute of limitations purposes had followed the liberal "in the picture" standard of "willfulness" first enunciated in Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), cert. denied, 409 U.S. 948 (1972).* Under this standard, all that needed to be shown to establish a "willful" violation for purposes of the statute of limitations was that the employer knew the Act "was in the picture." 458 F.2d at 1142. In cases where we were confident that we could establish "willfulness" under this standard, there was no need to file the lawsuit within two years, for statute of limitations purposes.

It was not until the Supreme Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), that two courts, the Third and Seventh Circuits, began to define "willfulness" more restrictively. In Thurston, the court construed the "willful" violation prerequisite to an award of liquidated damages under the ADEA, 29 U.S.C. Section 626(b), holding that the provision required a knowing violation of, or reckless disregard for, the requirements of the Act. Subsequent to the Thurston decision, both the Third and Seventh circuits applied this "reckless disregard" standard in the context of defining "willfulness" for statute of limitations purposes. The Department of Justice has filed a petition for certiorari in the Third Circuit case, Brock v. Richland Shoe Co., 799 F.2d 80 (3rd Cir. 1986), pet. for cert. filed, S.Ct. Docket #86-1520, a case in which the court of appeals adopted the "reckless disregard" standard for the statute of limitations. As of this date, the Court has not acted on the petition.

Once the Commission became aware of the Brock decision and the petition for certiorari in that case, we advised our field offices of this problem and directed them to expedite their submission of these cases for Commission litigation approval. The General Counsel's memorandum of August 18, 1987, is a product of this direction.

It is also important to recognize that in lawsuits filed by the Commission, the statute of limitations is tolled during the time the Commission is attempting to conciliate a case. (Section 7(e)(2), 29 U.S.C. Section 626(d)(2).) The tolling can result in an extension of the statute of limitations for up to one year. Ibid.

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* The "in the picture" standard was followed by the First, Second, Fourth, Fifth, Ninth, Tenth, Eleventh federal circuit courts of appeals.

Your request asks that we identify the number of ADEA cases submitted to our headquarters in Washington from our field offices, during the period from October 1, 1986, through August 18, 1987 which are beyond the two year and three year statute of limitations. Our records indicated that during this period, 61 were submitted within two years after the alleged violations, 35 additional cases within three years after the alleged violations, and 8 were submitted more than three years after the alleged violations.* In considering these figures, it is important to recognize that they do not take into consideration the tolling of the two and three year statutes of limitation periods, which may occur for as much as one year, for conciliation. The actual amount of time the statute is tolled is often a disputed issue of fact which requires judicial resolution after a suit has been filed. For this reason we are unable to precisely identify the effect the tolling provisions have on the applicable statute of limitations.

QUESTION 11:

What were the causes for the delays in submitting the presentation memoranda, and how do the delays described in the General Counsel's August 18, 1987 memo compare with such delays in 1986, 1985, 1984, and 1983?

ANSWER:

There are a number of reasons why the Commission's processing of ADEA charges, including our investigation and conciliation efforts, has been lengthy. As we discussed in our response to Question 10, the statutorily mandated process of investigation and conciliation can be quite time consuming. In addition, as we also previously noted in response to Question 10, the fact that our investigation and conciliation efforts extended beyond two years did not pose a statute of limitations problem in those jurisdictions following the "in the picture" standard of "willfulness" for statute of limitations purposes. Now that two circuits, the Third and Seventh Circuits, have adopted the more rigorous "reckless disregard" standard, we have advised our field offices that we must expedite our processing of these cases to avoid even the possibility that courts may apply the Thurston decision in construing the term "willful" in the three year statute of limitations.

The Commission has taken a number of steps to speed up the process of getting ADEA and other Commission cases to the Commission for their review. The increase we received in our budget this past fiscal year has allowed us to fill the numerous vacancies we had in our investigative staff. In addition, this past June the Commission conducted its first national training session in which all investigators were provided extensive training on effective investigative techniques. We believe that this training should lead to more effective, expeditious investigations in all Commission cases.

The Commission also has sought to reemphasize the need for rapid, but thorough, investigations in ADEA cases. The memorandum of August 18, 1987 which you cite is an example of this emphasis. In addition, the average case processing time in our district offices is 180 days. Such an average processing time should allow for complete investigations and at the same time ensure that cases are promptly processed. We have encouraged district offices to strive for 150 days where possible.

Finally, we wish to point out that the Commission does not maintain readily accessible data that would allow us to compare the time it took to process ADEA cases this fiscal year with the time it took to process such cases during fiscal years 1983 through 1986. To make this comparison, we would need to pull each of the ADEA cases submitted during this period to determine the processing time in each case.

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* There were a total of eight cases submitted during this period for which we do not at this time have sufficient information to make the requested statute of limitations calculations.

QUESTION 12:

It is the policy of the Commission to inform complainants of the running of these statutes, and if so, were all the complainants involved in the cases referred to in the General Counsel's August 18, 1987 memo notified prior to the running of the statutes of limitations? How were they notified, by telephone or in writing?

ANSWER:

Our compliance manual provides that, before an ADEA charge is taken, the Charging Party should be advised of the time limits for filing a charge and of the two year and three year statutes of limitation applicable in such cases. Our compliance manual further provides that once a charge has been taken, the Charging Party be given more information about the agency's procedures. As part of this post-charge counseling in ADEA cases, the manual directs the EEOC Investigators (formerly Equal Opportunity Specialists) to again advise the Charging Party that suit must be filed within two years of the discriminatory act (three years, if willful) to be timely. (Section 2.6(e)).

The EEOC has recently developed an "Information Sheet for Charging Parties and Complainants" (Exhibit 2-F in Compliance Manual). This sheet, which is available in English and Spanish, again advises those who have filed ADEA charges of the two year and three year statutes of limitation. In instances where ADEA charges are submitted to the Commission by letter, similar notification of the two and three year statutes of limitation is provided. (See Compliance Manual Exhibits 2-E & 2-F.)

After the EEOC terminates its processing of an ADEA charge, the Compliance Manual section which pertains to the dismissal of charges of discrimination specifically requires the investigators to advise Charging Parties of the applicable statutes of limitation in their particular case. To better inform individuals of their rights in these cases, the Commission has developed a written notice, in English and Spanish, to be provided to Charging Parties in such cases. (See "Information Sheet for Charging Parties and Complainants," Form SOP-10, 7/87.) (copy attached).

If the Commission has investigated a claim of age discrimination and determines that there is a reasonable basis to believe that the ADEA has been violated, the EEOC issues a letter of violation. Once a letter of violation is issued and conciliation is unsuccessful, the district office prepares a recommendation for Commission litigation. Section 66 of our compliance manual provides that if the Commission approves litigation, the district office should telephone the Charging Party to advise him or her of this decision. The manual also states that the district office should notify the Charging Party or other aggrieved individuals of their right to pursue their own private action when the EEOC will not initiate litigation.

The notice requirements, which have been discussed, also apply to concurrent ADEA/Title VII of ADEA/EPA jurisdiction. Section 6 of our Compliance Manual provides examples of form "Right to Sue" letters which each provide notice of the applicable two and three year statute of limitations. (See, e.g., Exhibits 6-C, 6-F & 6-G).

QUESTION 13:

During the hearing, we discussed the Commission's recent rule regarding waivers of rights under the ADEA. The Commission has consistently contended that for any waiver to be valid, it must be "knowing and voluntary" on the part of the employee. Would you please explain for the record the criteria to be used in determining whether such a waiver has, in fact, been made knowingly and voluntarily? Who will bear the burden of proving that such waivers were not made voluntarily? Would you please explain why this is the case? Does this represent a shift in the burden of proof from the past? Why or why not?

ANSWER:

The Commission decided to include specific standards for knowing and voluntary waivers in its Final Rule for two reasons: first, to provide greater protection for employees who sign waivers, and, second, to codify these standards in the Rule and in so doing to make clear the responsibilities of employers to ensure that waivers are not coerced.

The Final Rule identifies factors that the Commission will use to evaluate whether a challenged waiver is knowing and voluntary. These factors are: first, the agreement was in writing, in understandable language and clearly waived the employee's rights or claims under the ADEA; second, a reasonable period of time was provided for employee deliberation; and third, the employee was encouraged to consult with an attorney. Even where these specified factors are present, the Commission will, of course, when a waiver is challenged, carefully examine all circumstances of the waiver transaction to determine whether there was fraud or duress. When waivers are challenged, the Commission intends to look very closely at the substance as well as the form. The Commission will investigate the totality of the circumstances and make a determination whether the waiver is valid. If we find a waiver was not knowing or voluntary, we will take aggressive action to vindicate the rights of the individual who signed it.

In the course of reviewing challenged waivers, the Commission will inquire, of course, as to whether the employer apprised the employee of the rule and its safeguards prior to the execution of the waiver.

Where a waiver is challenged by an employee as not having been entered into in a knowing and voluntary manner, the Commission will ascertain from both parties the necessary information on that issue. Of course the employee challenging the waiver initially would be expected to articulate reasons for his belief that it was not knowing and voluntary. The challenged waiver then would be evaluated on the basis of the totality of the circumstances without using a formal process of initial burden or shifting burdens of proof. Once the Commission decides to litigate, the employer would bear the burden of proving the waiver as an affirmative defense.

This does not represent a shift from the past, but it is consistent with governing legal principles and is the manner in which the Commission has evaluated waiver defenses and challenged waivers under Title VII in the past.

QUESTION 14:

During the hearing, we discussed your Fiscal Year 1988 staff request. We also discussed the fact that you presently have several staff vacancies in your Systemic Litigation Services division of the Office of General Counsel. While I agree that additional staff is needed, would you please explain to me why Congress should grant your staffing request given the fact that you presently have so many vacancies which need filling? How soon do you plan to fill these vacancies?

ANSWER:

The Office of General Counsel has already hired two attorneys for Systemic Litigation Services. In addition, Systemic Litigation Services has been authorized by the Office of General Counsel to advertise for one additional attorney position, two clerical positions and a paralegal position. Further staffing decisions cannot be made until after the Office of General Counsel reviews the program and function of Systemic Litigation Services. This review is currently in progress.

My comments at the hearing regarding additional staffing related to the need to increase staffing in our field offices, the offices which carry the vast bulk of the Commission's workload of investigating, conciliating and litigating cases of discrimination.

For fiscal 1988, we have requested an appropriation of $193.4 million, an increase of $23.9 million over fiscal 1987 funding. The requested budget would allow EEOC to add 142 positions in our field offices across the country and in the Office of Review and Appeals, which reviews appeals of federal sector EEO determinations. In addition, approximately $1 million of the request is for automation to more efficiently manage data pertaining to discrimination charges. State and local program funding would rise $4.2 million to a total of $24.2 million under our request.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

OCT - 6 1987

The Honorable John Melcher
Chairman
Special Committee on Aging
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

This letter separately responds to questions 6, 7, 8, and 9 of your September 21, 1987 letter. We respond separately because we request that the questions and answers not be made part of the public record of the September 10 hearing before the Senate Special Committee on Aging.

The general governmental deliberative privilege is a well recognized privilege against the disclosure of pre-decisional discussions and deliberations. Its purpose is to permit decisionmakers to explore all avenues of inquiry, to freely exchange ideas and to candidly state opinions. The questions identified above reveal part of the Commission's deliberations on whether to institute suit against Xerox and we request that the Committee honor the privileged nature of those deliberations. Likewise, the Government in the Sunshine Act exempts from public disclosure any matter relating to an agency's decision whether to participate in a lawsuit. [5 U.S.C. subsection 552~~b~~(c) (10)]. This statutory exemption shares the same purpose as the general governmental deliberative privilege and protects the law enforcement decisions of the Commission from disclosure, i.e., prevents disclosure of standards or theories used in the prosecutional decision making process so that companies cannot structure their operations to avoid prosecution of statutory violations.

We request that you honor this Congressionally created privilege against disclosure.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

[Upon the advice of the Office of Senate Legal Counsel, Chairman Thomas' request, by his foregoing letter, dated October 6, 1987, that his answers to questions 6, 7, 8, and 9, not be made a part of the official record of the September 10, 1987 Committee Hearing, is not being honored for the following reasons: (1) publication of his answer to each of those four questions in this official record of said September 10 Hearing is determined and deemed to be necessary to the performance of the oversight function of the Special Committee on Aging; (2) the Sunshine Act, cited by Chairman Thomas, applies only to executive agencies, not to the Congress; that Act creates no prohibition against public disclosure; that Act does not apply to Congressional requests for information from executive agencies; and (3) the deliberative process privilege, cited by Chairman Thomas, is not applicable to Congressional requests for information from executive agencies and does not afford executive agencies any protection from public disclosure of information provided in response to a request from Congress.]

QUESTIONS 6 THROUGH 9
FROM SENATOR JOHN MELCHER

QUESTION 6:

EEOC regulation at 29 CFR 1625.7(f) establishes that a defense of economic necessity cannot be used by employers to justify terminating older workers. Nonetheless, during the Commission's meeting on March 16, 1987 at which the Office of General Counsel presented its recommendation to pursue age discrimination litigation against Xerox, you stated: "Getting rid of higher-priced employees who happen to be older is not a violation of the Act. . . This is a common business practice. If we hold against Xerox, then we'll have to go after everyone else." What are the legal and regulatory bases for these opinions which you voiced at the March 16 meeting? Do these opinions constitute Commission policy and, if so, when was this policy established? Please provide any and all documentation supportive of your answers to these questions.

ANSWER:

Decisions involving litigation are considered in closed sessions so that all members of the Commission may voice any and all questions which may be suggested by the facts of a particular case. Although I have not reviewed the taped recording of the closed Commission meeting which is referenced in Question 6, I can say that all questions raised by me during any closed sessions are made in the spirit of open discussion and no question I may ask establishes a Commission policy or binds any other member of the Commission.

QUESTION 7:

During that same March 16, 1987 Commission meeting, you stated during the discussion of the Xerox case: "These voluntary reductions-in-force, which are always going to be directed at senior employees, are not violative of the Act unless you can prove coercion." When asked by Associate General Counsel James Finney, "Wouldn't a threat of an involuntary reduction in force constitute coercion?", you responded, "No, it constitutes reality." Please explain what you meant by stating that "it constitutes reality." What are the legal and regulatory bases for your opinion that the "threat of an involuntary reduction in force" constitutes "reality" and not "coercion"? Please provide any and all documentation supportive of your answers to these questions.

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ANSWER:

In question 7, reference is made to a brief exchange during a closed meeting. Although I have not reviewed the taped recording of that meeting, my recollection is that during the Commission meeting I observed that it appeared to me that a company would always use an involuntary layoff program if a voluntary program was ineffective in reducing a workforce.

This remark was made because I was wondering how it is possible to infer hostility to older workers and age-based animus based solely on the fact that a company is prepared to conduct involuntary layoffs if a voluntary program fails to reduce the workforce.

QUESTION 8:

In light of your opinions expressed at the March 16 meeting regarding the Xerox case, please describe what, in your opinion, would constitute coercion in workforce reductions and early retirement programs affecting older workers, and what would have satisfied your definition of coercion in the Xerox case.

ANSWER:

The consideration of litigation is made on a case by case basis only after investigation and conciliation has not resolved the matter. Inasmuch as the facts of every case are unique, I cannot speculate what additional facts may be uncovered in a different case. I can only say that in the Xerox case, the totality of the evidence presented did not convince me that age animus or age-based coercion had been proven.

QUESTION 9:

You stated in testimony before the Committee on September 10, 1987 that, when the Office of General Counsel presented the Xerox case to the Commission for consideration on March 16, 1987, General Counsel "provided no evidence" to support its recommendation for litigation in the Xerox case. Later, upon examining documents from the Commission's Xerox case files, I found that you and the other Commissioners had been provided, or had been made aware of, the following: internal EEOC staff memoranda establishing that, since 1984, when EEOC opened its investigation of Xerox, the company had continued to withhold information and data essential to the EEOC investigation and had misrepresented computer data it had furnished for a period of six months; and statistical analyses, testimony from former Xerox officials, copies of internal Xerox memos, and interviews

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from more than 50 former Xerox employees which "showed compelling evidence of a pattern of deliberate age discrimination" by Xerox officials. What were the legal and regulatory bases for your having discounted these materials and information as evidence? Please provide any and all documentation supportive of your answer to this question.

ANSWER:

During the consideration of litigation, each member of the Commission analyzes the facts of a particular case and draws conclusions based on those facts. I reviewed internal staff memoranda during my analysis of the facts of the Xerox case. However, in that case, I disagreed with the conclusions drawn by the staff of the Office of General Counsel because in my opinion, the facts cited in the staff memoranda were insufficient to support the conclusion that the company was motivated by age discrimination in conducting its reduction in force program. In fact, in this memorandum, the attorney presenting the case did not claim that our investigation produced evidence of intentional discrimination for the period of time relevant to litigation (post 1983). Rather, the memorandum notes there is evidence of earlier discrimination and states a belief that "during discovery, we can obtain similar evidence regarding the post 1983 time period."

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QUESTIONS FROM SENATOR CHARLES GRASSLEY

QUESTION 1:

Has the Commission begun work on the regulations for the pension accrual amendments to the Age Discrimination in Employment Act, which became law as part of 99-509? If no: When will you begin work on them?

ANSWER:

The Commission began the interagency coordination process under P.L. 99-509 in November 1986. Coordination and drafting has proceeded actively since that time.

QUESTION 2:

Do you anticipate that the regs will be finished by the date stipulated in the legislation?

ANSWER:

The Commission anticipates finishing its portion of the regulations before February 1, 1988, the date specified in the legislation. The Commission cannot speak for the other agencies that have regulatory authority under P.L. 99-509 (Departments of Labor and Treasury).

QUESTION 3:

As I understand it, at the direction of the District Court in February, 1987, you rescinded Labor Department Interpretive Rulings which had been made in 1979 and dealt with pension accruals.

I also understand that the regulations for old pension accrual law, which you issued for comment April 2, 1987, were never issued in final form.

So, where does that leave us on the pension accrual issue for workers who worked after 65 years of age during the period from 1978 to the commencement of the new law in 1988?

ANSWER:

On July 10, 1987, the United States Court of Appeals for the District of Columbia Circuit remanded the case of American Association of Retired Persons v. EEOC to the District Court for the purpose of remanding the case to the Commission for review of its November 10, 1986 decision to terminate rulemaking. As yet the District Court has not remanded the case to the Commission. As soon as the District Court acts, the Commission will make a determination as to whether further regulatory action is needed under section 4(f)(2) of the ADEA, considering the effective date of section 4(i). It is unlikely that any action under section 4(f)(2) could be retroactive. The District Court that ordered rescission of the interpretative bulletin did not address whether the bulletin was or was not a correct interpretation of the ADEA.

QUESTION 4:

One of our witnesses stated that when an individual files a charge, EEOC gives no explanation of its procedures or what the complainant's responsibilities are. They also said that EEOC gives no assistance to complainants when employers are dilatory in providing documents. They argued that EEOC provides no explanation of findings that no discrimination occurred, and that there are lengthy delays before EEOC makes determinations which complicates the subsequent filing of a law suit.

How do you respond to these charges?

ANSWER:

Contrary to allegations made concerning the amount of assistance available to charging parties during the charge-filing process, EEOC utilizes the following standard procedures to provide such assistance:

o Complainants are provided with a fact sheet (copy attached) which outlines the responsibilities of both the Commission and the charging party in filing a charge. In a continuing effort to improve public understanding of the Age Act, we have made brochures available which provide information about the statutes EEOC enforces. In addition, investigators have been trained to ensure that charging parties are fully informed of their rights.

o In obtaining documents from employers during the course of an investigation, it should be understood that the responsibility for obtaining the documents rests with EEOC, not with the charging party. Therefore, rather than assisting complainants in obtaining such documents, EEOC first determines what information is pertinent, and then takes responsibility for obtaining that information as evidence for our records. If resistance is encountered in securing documentation, the Commission can and does utilize its subpoena power to obtain the information required to complete the investigation.

o The investigative process is complex and multifaceted, and may give way to occasional delays because variations in cases cause variations in the scope and length of the investigative process (e.g. whether on-site investigation is required) and in the kind of evidence needed. For example, cases in which it is not immediately clear that individual harm or disparate treatment has or has not occurred, or where there is more than a single charging party (as in class actions), or where the respondent is uncooperative, often require additional processing time. In some offices, delays have recently occurred because of the disparity between personnel available and the increasing number of cases handled.

o Generally, there is no validity to the assertion that EEOC provides no explanation of no discrimination (or no-cause) findings. Standard operating procedures establish that a pre-determination interview be held between the charging party and EEOC (either by telephone or in person). Our investigators do their best to contact charging parties prior to closing a case. However, this is not always possible since some charging parties are difficult to contact.

o The Commission recognizes that complainants are often dissatisfied with no-cause findings, and therefore, created the Determination Review Program in December 1986. This division, which began operation August 1, 1987, reviews no-cause determinations at the complainant's request. Field offices are now expected to issue letters of determination with a summary of the facts and the analysis that led to the determination. This will result in a more informative letter for charging parties.

QUESTIONS FROM SENATOR PETE WILSON

QUESTION 1:

On August 1, 1987, the Washington Post ran an editorial called "The EEOC Is Thriving." It said: "Under the quiet but persistent leadership of Chairman Clarence Thomas, the number of cases processed has gone from 50,935 in fiscal 1982 to 66,305 last year. In the same time period, legal actions filed went from 241 to 526. To handle this much larger caseload and higher litigation level, this year's budget request was a record $193,457,000. That's one-third more than was spent at the beginning of this administration and $28,457,000 over last year."

It goes on to say: "Legislators who care about civil rights enforcement have a special obligation to sustain an agency doing this work . . . ."

Mr. Thomas, how would you characterize EEOC's enforcement of the Age Discrimination in Employment Act in comparison to the other statutes it is responsible for? Where does ADEA fit into this impressive record?

ANSWER:

While we receive more race discrimination charges filed under Title VII of the Civil Rights Act than any other type of charge, age discrimination complaints are on the increase and as the workforce ages we expect this trend to continue.

In Fiscal 1986, we filed 427 lawsuits. Of those, 289 were filed under Title VII, 109 were filed under ADEA, 12 were filed under the Equal Pay Act and 17 were filed concurrently under more than one statute.

Also in Fiscal 1986, 50,110 of the charges we received were under Title VII, 17,443 were under ADEA and 1,269 under the Equal Pay Act.

Of the total $100.2 million in monetary relief secured on behalf of victims of employment discrimination by EEOC through litigation and conciliation in FY 1986, more than half -- $54.6 million -- was under ADEA.

In fiscal year 1986, the Commission obtained more monetary relief through litigation of age discrimination cases than ever before. The record amount of $36.6 million accounted for almost 80 percent of the total $46.4 million recovered in litigation for discrimination victims under all EEOC-enforced statutes.

Of the $53.8 million in monetary benefits achieved through compliance in fiscal year 1986, $34.3 million were benefits recovered under Title VII, $18 million were benefits under ADEA and $1.4 million were recovered under the Equal Pay Act.

QUESTION 2:

Under your leadership, the Commission has taken a number of steps to beef up its enforcement program. What exactly have you done? What has been the result?

ANSWER:

We have adopted a number of formal policies intended to ensure the predictability and efficacy of EEOC's enforcement of the law. Our Enforcement Policy states that the Commission will review for litigation every charge in which reasonable cause has been found and conciliation has failed. It assures the certainty and consistency of our enforcement efforts. Our Remedies Policy declares that discrimination victims shall receive the fullest relief possible in every case. The Investigative Compliance Policy assures that EEOC will effectively deal with respondents who fail to cooperate with Commission investigations. The Determination Review Program gives complainants the right to appeal no cause findings, thus assuring a quality investigative process.

The results of these policies are better cases and better enforcement. EEOC's improved enforcement statistics speak for themselves.

QUESTION 3:

You have made a number of administrative and management improvements at EEOC. What have you done in those areas? Why was it necessary?

ANSWER:

Among the improvements you refer to, we have instituted:

- improved financial accountability;
- computerization;
- streamlined organizational structure;
- agency-wide Quality Assurance program;
- comprehensive training program for investigators.

We instituted sound management practices so that we could maximize the quality, effectiveness and efficiency of EEOC's service to the public -- and so that we could turn EEOC into the law enforcement agency it should have been all along.

QUESTION 4:

How much of your workload is class action cases, as opposed to individual cases?

ANSWER:

In fiscal 1986, 148 of the total 427 lawsuits we filed were class actions. Of that 148 cases, 76 were filed under Title VII, 63 were filed under ADEA, five were filed under EPA and four were filed concurrently under more than one law.

I hope this information is helpful to you.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

Enclosures

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

October 2, 1987

Mr. Max Richtman
Senate Select Committee on Aging
G-41 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Max:

Attached are the answers to the questions submitted to EEOC by Senator John Heinz relative to the September 10, 1987 hearing.

Per our conversation of October 2, 1987, at 4 p.m. the remaining package of answers (in response to Senators Melcher, Grassley and Wilson follow-up hearing questions) will be delivered to the Committee by noon on Monday, October 5, 1987. I appreciate your holding the record open this additional time.

Thank you.

Sincerely,

Marcia Sayer

Marcia Sayer
Director
Legislative Affairs Staff

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

October 1, 1987

**The Honorable John Heinz
United States Senate
Washington, D.C. 20510**

Dear Senator Heinz:

Thank you for your letter of September 18, 1987 in which you asked that we submit for the record answers to several questions on the Commission's waiver rulemaking. We are pleased to be able to answer these questions since we were not able to address your concerns at the hearing.

QUESTION 1:

In your testimony you state that the Commission's objective in initiating the waiver rulemaking was to provide clear, legal standards for allowing a release of private rights under the ADEA. How does the Commission plan to ensure that employees are aware of these standards and that releases are knowing and voluntary?

ANSWER:

The Commission decided to include specific standards for knowing and voluntary waivers in its Final Rule for two reasons: first, to provide greater protection for employees who sign waivers, and, second, to codify these standards in the Rule and in so doing to make clear the responsibilities of employers to ensure that individuals are not coerced to sign waivers.

The Final Rule identifies factors that the Commission will use to evaluate whether a challenged waiver is knowing and voluntary. These factors are: first, the agreement was in writing, in understandable language and clearly waived the employee's rights or claims under the ADEA; second, a reasonable period of time was provided for employee deliberation; and third, the employee was encouraged to consult with an attorney. Even where these specified factors are present, the Commission will, of course, when a waiver is challenged, carefully examine all circumstances of the waiver transaction to determine whether there was fraud or duress. When waivers are challenged the Commission intends to look very closely at the substance as well as the form. The Commission will investigate the totality of the circumstances and make a determination whether the waiver is valid. If we find a waiver was not knowing or voluntary, we will take aggressive action to vindicate the rights of the individual who signed it.

In the course of reviewing challenged waivers, the Commission will inquire, of course, as to whether the employer apprised the employee of the rule and its safeguards prior to the execution of the waiver.

We have established a number of outreach and communications programs that effectively provide information and educational assistance to the public. As with all information the Commission offers about laws, regulations, programs and policies, we will ensure that the public is advised of the provisions of the waiver rule through outreach programs as well as in responses to inquiries.

QUESTION 2:

Please elaborate on the three "fundamental indicators or standards" you have laid out for valid waivers. Specifically:

a. On what basis will the EEOC determine if language is understandable? To whom does it have to be understandable?

b. As to the "reasonable period of time" for employees deliberation what is the minimum time you would find acceptable?

c. Does the requirement that an employee be encouraged to consult an attorney have to be in writing or would an oral statement suffice?

ANSWER:

a. For a waiver to be knowing, the language must be understandable to the person signing the waiver. The Commission will look at the situation of each employee, such as the employee's educational level, experience with contracts, opportunity to negotiate the waiver being challenged, participation of an attorney on the employee's behalf and the discussion and explanation that may have been associated with the written waiver. All of these considerations and perhaps others would be used to determine if the document was understandable in the circumstances of the waiver being challenged.

b. The Commission will evaluate the time provided for employee deliberation on the basis of the given individual's circumstances. The Commission does not believe it advisable to set an absolute minimum or fixed time limit for all cases, because that would only encourage employers to provide only the minimum. Where the employee is well educated, has experience in contract matters, has actively participated in the negotiation of the waiver and/or has consulted with an attorney, the time limit considered reasonable might be quite different from the challenged waiver of an employee of lesser education and experience without benefit of counsel. What is important is that the employee have an opportunity for full appreciation and evaluation of the rights being waived and the consideration he or she will receive in exchange for that waiver. Only on a case-by-case basis can the Commission properly evaluate whether a fair opportunity was provided.

c. The Final Rule requires that the waiver itself be in writing but does not specify that all waiver procedures be so recorded. Whether the advice to consult an attorney was in writing or not, the determining factor will be whether or not the employee was actually encouraged to consult an attorney.

QUESTION 3:

You stated that it is the Commission's policy to encourage voluntary settlement of ADEA claims. I am concerned that voluntary settlements without the involvement of the EEOC will result in plaintiffs settling for smaller awards than those granted by courts when claims are fully litigated. What data do you have to suggest that voluntary settlements would yield amounts comparable to adjudicated claims? What plans does the Commission have to assure that voluntary settlements will result in fair remuneration of aggrieved employees?

ANSWER:

The Commission does not have data comparing relief obtained through voluntary private settlements with relief obtained through litigation by private plaintiffs. In making such a comparison, it is important to recognize that although higher benefits may sometimes be gained through litigation than through settlement, there always exists the possibility that litigation will result in no relief. Litigation is also time-consuming and costly. Voluntary settlements allow individuals to avoid the costs and the delays that accompany litigation, while providing immediate relief.

The purpose of the Commission's waiver rule is to allow employees to make an informed decision for themselves whether to settle for an immediate award or to pursue litigation.

If an individual does not believe the proposed settlement satisfactorily resolves his or her claim of discrimination, he or she may file a charge with the Commission. The Commission will investigate and, if it finds discrimination has occurred, will demand full make-whole and prospective relief and bring suit if conciliation efforts fail.

QUESTION 4:

Large court awards, in my judgment, act as a deterrent to companies which might otherwise engage in practices of age discrimination. With the EEOC's increasing emphasis on voluntary settlements, I am concerned that companies will be encouraged to increase the practice of age discrimination. What actions are you taking to ensure that the risks for companies that engage in age discrimination will remain substantial?

ANSWER:

We agree that large court awards are a highly effective deterrent to discrimination, and for that reason the Commission has strengthened its litigation program and adopted a policy of demanding full relief for all victims of discrimination. The evidence of the success of our efforts, both in ADEA cases and under the other statutes, can be found in the data we submitted to the Committee on the record number of case filings and monetary awards. The Commission has done away with the old "Rapid Charge Processing" system, which emphasized early settlements for less than full relief without regard to the merits of the charge. The waiver rule absolutely does not reflect renewed emphasis on such voluntary settlements but rather was needed simply to clarify the *status quo* with respect to ADEA waivers and put them on the same legal footing as Title VII waivers. During the last four years, the Commission quadrupled the number of lawsuits it filed under the ADEA.

Most important, the waiver rule does not affect the rights of victims of age discrimination who do not wish to settle their claims. Waivers, if knowing and voluntary, can bar the individual's recovery on the merits of a claim but can never bar that person's right to present the waiver to the Commission for its scrutiny. Indeed, the rule specifically provides that a waiver cannot prevent an employee from filing a charge with the Commission or participating in a Commission investigation, and cannot affect the Commission's rights and responsibilities to enforce the Act. The rule thus codifies and makes generally applicable a recent decision in a case of first impression, *EEOC v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987). In that case, the Fifth Circuit upheld the Commission's position that a waiver cannot insulate the employer from the scrutiny of and enforcement remedies available to the Commission for protection of the public interest regarding the claim or others like it.

The Commission's experience with Title VII enforcement may also be indicative of the impact of the ADEA waiver rule. Although unsupervised waivers have always been permissible under Title VII, large court awards are frequently obtained and no evidence has been found that would indicate employers are encouraged by the waiver policy to discriminate.

The Commission has sought and will continue to seek the substantial relief that the ADEA provides for victims of age discrimination. We believe that the $36.6 million that we recovered last year through our aggressive litigation on behalf of age discrimination victims constitutes a powerful deterrent to age discrimination.

I hope this information is helpful to you.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

November 12, 1987

The Honorable John Melcher
Chairman
Special Committee on Aging
United States Senate
G-42 Dirksen Senate Building
Washington, D.C. 20510

Dear Mr. Chairman:

On November 6, 1987, Mr. James Michie of your committee staff requested and received the following documents from the Equal Employment Opportunity Commission:

- March 3, 1987 memo from Legal Counsel.
- March 13, 1987 memo from General Counsel.
- June 30, 1987 staff draft of Cipriano brief.
- June 30, 1987 memo on draft brief.
- June 30, 1987 draft brief from General Counsel.
- July 8, 1987 memo from Richard Komer, Legal Counsel.
- July 9, 1987 memo from Vice Chairman R.G. Silberman.
- Final Cipriano brief filed with the court.
- Supplemental document filed with the Cipriano brief.

All documents listed above, with the exception of the two documents filed with the Court, were part of the Commission's deliberative process and must not be made part of the public record. Although we have shared these documents with you as your Committee conducts its oversight responsibilities, they are not intended for publication or public disclosure. The general governmental deliberative privilege protects law enforcement discussions of the Commission from disclosure.

We also would like to reemphasize that all EEOC documents pertaining to the Xerox case are subject to the Government in the Sunshine Act which exempts from public disclosure any matter relating to an agency's decision whether to participate in a lawsuit. [5 U.S.C. subsection 552 b(c) (10)]. This statutory exemption shares the same purpose as the general governmental deliberative privilege and protects the law enforcement discussions of the Commission from disclosure.

Mr. Michie indicated that he has received other unspecified documents which also may be subject to the same deliberative privilege, and we note that such documents should not be made part of any public record.

EEOC is proud of our record and we will gladly provide the Committee with information about our enforcement of ADEA. I trust the Committee will honor this request for confidentiality where the general governmental deliberative privilege or the statutory exemption to the Government in the Sunshine Act apply.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

AARP

November 16, 1987

TO: Special Committee on Aging, United States Senate

FROM: American Association of Retired Persons

RE: Hearing on September 10, 1987
"EEOC Enforcement of the Age Discrimination in Employment Act"
AARP Responses to Supplementary Questions
(for inclusion in the Record of the hearing)

SENATOR MELCHER'S QUESTIONS

WAIVERS OF ADEA RIGHTS

1) The Commission contends that permitting unsupervised waivers will encourage voluntary resolution of disputes and speed up the conciliation process. Do you dispute this?

The EEOC's contention directly contradicts congressional intention and the language of the ADEA. At least two U.S. Courts of Appeals have held that the prohibition against unsupervised waivers was "intended to create an incentive for employers to voluntarily accept settlements supervised by the enforcement agency." Lynn's Food Stores, Inc. v. U.S., 679 F.2d 1350, 1353 (11th Cir. 1982), citing Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537, 539 (5th Cir. 1977). This intention is also expressed in the legislative history to the 1949 amendments to the Fair Labor Standards Act, which is incorporated into the ADEA. See Sneed, supra, 545 F.2d at 539 n. 5.

The EEOC's contention is also illogical. Because a supervised waiver provides an employer with greater protection from subsequent litigation, it should be a greater incentive to voluntary settlement.

2) The waiver rule leaves unchanged the fact that employees can refuse to sign a waiver and thereby preserve their ADEA rights. Does this provide adequate protection for employees?

No. First, waivers are usually requested of employees in situations that are inherently coercive, e.g., at the time of termination of employment, whether voluntary or involuntary.

Employees in such circumstances usually do not perceive that they have a choice about signing a waiver.

Second, at the time they are asked to sign a waiver, few employees have any reason to believe that their ADEA rights are implicated, even if they know what those rights are. Although the EEOC claims that its rule requires that a waiver specifically mention the ADEA, it is not uncommon for terminated employees to find out long after their release that the employer's conduct violated the ADEA and that age was a "determining factor" in their discharge.

This is particularly true for early retirement incentive programs. Each year, thousands of employees are enticed to waive their rights in exchange for such incentives long before a viable claim of age discrimination exists. Although the EEOC rule requires that an employee have an opportunity to consult an attorney prior to signing the waiver, this offers only minimal protection. The only evidence of an employer's discrimination may be the large number of older workers induced to retire, which information is rarely available until long after an individual employee signs a waiver.

3) The waiver rule preserves an employee's right to file a charge with the EEOC if he or she believes there has been discrimination. The rule also states that any such waiver must be both knowing and voluntary. Why isn't this enough to protect employees? How can anyone determine with certainty that a waiver has not been made knowingly and voluntarily? Who bears the burden of proof in this situation and why is this the case? Does this represent a change from the past?

As AARP's response to question #2 indicates, the "knowing and voluntary" standard adopted by the EEOC is irrelevant if the employee is unaware of or unable to determine whether the employer's conduct violates the ADEA at the time a waiver is requested.

Furthermore, employees who sign waivers are unlikely to know both that they retain the right to file an administrative charge, and the relief available to them upon filing such a charge. It is also unclear that the EEOC will pursue such charges once it finds there has been a "knowing and voluntary" waiver, even if further investigation would determine that the employer's conduct violated the ADEA.

There is insufficient legal precedent to say with certainty which party bears the burden of demonstrating that a waiver was or was not "knowing and voluntary." The EEOC's final rule suggests that a waiver is presumed to be valid if (a) the agreement was in writing and clearly mentions the ADEA, (b) there was "reasonable time" for the employee to consider the waiver, and (c) the employee was encouraged to consult with an attorney. Such a rule establishes, at most, a de minimis burden of proof for the employer.
It is certain, however, that the unsupervised waiver rule imposes an additional and substantial procedural hurdle to victims of age discrimination, with regard to both filing a charge and in litigation. The financial burdens attendant to addressing this issue in litigation may very well disincent the filing of otherwise meritorious charges.

4) The Commission contends that it cannot supervise each waiver agreement between an employer and an employee. Should the EEOC be supervising each waiver? Do you think the EEOC has the resources to supervise all waivers?

AARP does not urge the EEOC to supervise all waivers, nor does the ADEA require this. Rather, the ADEA renders valid and enforceable only those waivers actually supervised by the EEOC. If an employer wants the protection that the law provides, the employer must ensure that the EEOC is actively involved. In cases in which a waiver is requested to solve a dispute, the EEOC will already be involved (the ADEA requires the EEOC to engage in conciliation efforts) and supervision of the waiver by the agency would be expected by all parties and not burdensome on the agency.

To the extent that the EEOC wishes to facilitate the execution of waivers, but believes it does not have the resources to do so, it should address this concern to Congress. It does not have the authority to address this by changing the law by administrative fiat, as it has done so here.

EARLY RETIREMENT ISSUES

5) In your testimony, you expressed concern regarding exit incentives. Do you believe that such incentives violate the provisions of the ADEA? Are there cases where they do not? How can you determine whether an exit incentive violates the intent or spirit of the law? Are such incentives ever in the best interest of the employee? Why?

In the past decade, scores of employers have relied upon early retirement incentive programs when faced with the need to reduce the number of employees in their labor force. Programs that target older workers perpetuate the harmful and mistaken stereotype that such employees are the most dispensable.

Notwithstanding these philosophical reservations, such programs are not per se illegal under the ADEA. There are, however, two types of legal claims that may arise under the law: first, all programs must be truly voluntary, i.e., they cannot require or permit involuntary retirement. "Voluntary" programs that are accompanied by threats of subsequent layoffs or terminations, particularly when such programs are targeted at older workers and/or have short election periods, cause older workers to reasonably conclude that they have no alternative but to leave employment.

Second, even truly voluntary programs may violate the ADEA if the incentives or benefits offered discriminate on the basis of age, e.g., younger workers are offered a cash incentive to leave that is not offered to older workers. For more than 20 years, the ADEA has been interpreted by the enforcing agencies (first, the Dept. of Labor; now the EEOC) and Congress as permitting age-based reductions in employee benefits only when such reductions are justified by increased, quantifiable costs to the employer for providing the challenged benefit to older workers on an equal basis. Reductions in benefits based on age, or the arbitrary denial of incentive benefits based on age, are almost never justified under the accepted narrow reading of the ADEA - especially when the benefit is cash. The best example of this is the case of Cipriano v. Bd. of Ed. of No. Tonowanda. The two plaintiffs in Cipriano were denied a $10,000 retirement incentive simply because they were beyond the age of 60. Because there is no difference in the employer's cost of providing such a cash incentive to a younger worker and to an older worker, this type of arbitrary benefits discrimination violates the ADEA.

AARP believes that employers can accomplish their overall objective of workforce reduction by offering "exit incentives" to all employees regardless of age. For example, in Cipriano, the employer could have accomplished its goal of workforce reduction by offering $10,000 to all teachers.

6) There are many people who contend that it is simply a business reality that midlife and older workers are paid more than younger workers, and therefore employers who need to save money are justified in getting rid of their most expensive employees, first. Please explain your position regarding this issue as it relates to 29 C.F.R. sec. 1625.7(f).

AARP would not agree that older workers are "more expensive" than younger workers. Older workers are generally more experienced, more skilled and more expert in performing their tasks and job responsibilities than are younger workers. For this reason, they are often more productive and therefore more valuable to their employer.

It is true, however, that there is often a correlation between years of service, salary and the age of an employee. In recognition of this, both enforcement agencies and the courts have consistently held that adverse employment decisions based upon salary or years of service violate the ADEA because such distinctions inevitably implicate age.

In 1968, after the passage of the ADEA, the Dept. of Labor issued an interpretation of the law declaring that any differentials based upon the average cost of employing older workers would violate the ADEA. See 29 C.F.R. sec. 860.103(h). In 1986, the EEOC adopted this interpretation, 290 C.F.R. 1625.7(f). In Metz v. Transit Mix, Inc., No. 86-2261 (7th Cir., August 28, 1987), the court agreed with this interpretation by holding that an employer's decision to terminate an older worker based upon his higher salary constituted disparate treatment under the ADEA. Other courts have also found similar violations under the disparate impact theory. AARP agrees with the Metz opinion and its progeny that:

> . . .Courts have also emphatically rejected business practices in which 'the plain intent and effect . . . was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts.'"

Metz, 179 D.L.R. at D-2 (Sept. 17, 1987), citing Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983). See also EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984); Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983), affirmed on rehearing, 728 F.2d 976 (1984); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).

SENATOR GRASSLEY'S QUESTIONS

PENSION BENEFIT ACCRUAL

1) What is your interpretation of the present situation with respect to pension accrual that faces workers who worked past the age of 65 between 1978 and 1988?

Since the passage of the 1978 amendments to the ADEA, AARP has maintained that the law prohibits employers from discontinuing pension contributions, credits and accruals for employees working beyond "normal retirement age," (often, age 65). Prior to 1979, there was never any indication from the enforcement agency or the courts that "freezing" pensions at normal retirement age was permitted under sec. 4(f)(2) of the ADEA. Thus, AARP continues to believe that the Dept. of Labor's 1979 Interpretive Bulletin sanctioning such conduct by employers was an unjustified and improper deviation from the original position adhered to by the government and the courts.

In 1984 and again in 1985, the EEOC concluded that the ADEA requires post-normal retirement age pension benefit accrual and has never since deviated from that conclusion. The Interpretive Bulletin was rescinded in March 1987 and proposed regulations requiring post-normal retirement age pension accrual were issued by the EEOC in April 1987. Unfortunately, these rules have neither been made final nor withdrawn.

OBRA of 1986 makes clear that employees who continue to work in plan years beginning after January 1, 1988 are entitled to pension benefit accrual on an equal basis regardless of age. However, individuals who retire prior to Jan. 1, 1988, are not protected by the new amendments. AARP believes that if such retirees were denied accrual of pension benefits by their former employer for work past normal retirement age, they should pursue with the EEOC charges of discrimination based upon the pre-1988 ADEA and the EEOC's consistent interpretation of the law since 1984. Unfortunately, information received from AARP members indicates that confusion abounds in EEOC District Offices concerning the appropriate processing of these charges. AARP believes that all such charges must be vigorously pursued and Letters of Violation must be issued based upon the EEOC's repeated conclusions in 1984 and 1985 that the "freezing" of pension benefits based on age violates the pre-1988 ADEA.

For employees who continue to work at least one hour into plan years beginning after Jan. 1, 1988, however, the new amendments to the ADEA require that their pension benefits be calculated in a non-discriminatory manner upon their retirement. Thus, if an employee retires after the effective date of the new amendments, calculation of his or her pension benefits must include consideration of all years of service, including those prior to January 1, 1988. This interpretation of OBRA of 1986 not only comports with the EEOC's interpretation since 1984 that the ADEA currently requires pension benefit accrual but resolves in consistent fashion any questions about employers' obligations under current law.

2) Is it your position that, if EEOC had gone ahead and issued regulations for the old law requiring pension accrual for those who work past 65, that would have settled the issue for those potentially eligible for additional pension benefits between 1978 and 1988?

Yes. In its votes on June 26, 1984 and March 5, 1985, the EEOC concluded that the ADEA required post-normal retirement age pension benefit accrual; decided to rescind the existing Interpretive Bulletin permitting employers to cease such accruals at age 65; and decided to issue binding regulations under sec. 9 of the ADEA that would require employers to provide continued contributions and accruals for older workers. At the very least, these regulations would have required non-discriminatory treatment of all employees retiring between the time the regulations would have been effective (circa early 1985) and effective date of the new amendments (Jan. 1, 1988) for all employees retiring after 1985. The EEOC conceded in the litigation brought by AARP to force issuance of these long-delayed regulations that the denial of continued accruals has cost older Americans $450 million in lost pension benefits every year. AARP v. EEOC, No. 86-1740 (D.D.C. February 26, 1987). Thus, the agency's refusal to issue the new regulations has already cost the nation's older workers at least $1.35 billion.

3) With respect to development of regulations for the new law on pension accruals, are there any issues AARP believes this Committee should pay special attention to?

Yes. A) As noted above (question #2), AARP believes that all employees retiring after the effective date of the new amendments are entitled to receive full credit for all post-normal retirement age service, including years prior to Jan, 1, 1988. However, draft regulations approved by the EEOC on November 2, 1987 for publication explicitly exclude consideration of prior years of service when calculating the pension benefits of such employees. This position contradicts not only the explicit language of OBRA of 1986, but the EEOC's repeated declarations concerning the illegality of "freezing" pensions under the pre-1988 ADEA. As such, it is sure to generate confusion, inequity and litigation.

It should also be noted that the EEOC is preparing to issue these regulations in the absence of contemporaneous regulations by the Internal Revenue Service and the Dept. of Labor. OBRA of 1986 requires these agencies to coordinate and issue consistent regulations on the new law; it furthermore gives primary responsibility for this effort to the IRS. The EEOC's unilateral issuance of regulations will create confusion and uncertainty.

B) Section 4(i)(6) of the ADEA, as amended to be effective in 1988, must be limited to the "subsidized" portion of an early retirement benefit. AARP believes that the language of the new law affects only permanent actuarial subsidies available to all employees who reach early retirement age under the plan. The new sec. 4(i)(6) should not apply to the many varieties of early retirement incentive "windows" that are temporary in nature and whose exclusive and limited purpose is to provide a one-time reduction in workforce There is no indication in the language or legislative history of the new law that Congress intended to apply this accrual legislation to types of employee benefits that bear no direct relationship either to pension accruals or to "subsidized" early retirement benefits as those terms are commonly used in ERISA.

Appendix IV

INTERNAL EEOC DOCUMENTS PERTAINING TO ADEA POLICY DEVELOPMENT BY EEOC: EARLY RETIREMENT PROGRAMS—VOLUNTARY/INVOLUNTARY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

September 17, 1982

REJECTED
BY GC 12/1/82

MEMORANDUM

TO : Michael A. Middleton

THRU : Ivan Rivera
Daniel M. Williams, Jr.

FROM : Paul D. Brenner PDB

RE : Review of Presentation Memorandum from the New York District Office- Monroe Community College & Faculty Association of Monroe Com. College

I concur in part with the recommendation to litigate this novel and potentially controversial ADEA case, which involves early-retirement bonuses. Specifically, I concur in the recommendation to seek an injunction against continuation of the alleged unlawful practice. I also concur in the recommendation to seek monetary damages, which are over-stated as amounting to approximately $118,000--without regard to mitigation or failure-to-mitigate. However, I do not concur in the recommendation to seek liquidated (double) damages for the 7 known aggrieved individuals.

The case involves a collectively bargained retirement incentive plan. Under the plan, some faculty members receive lump sum bonuses if they voluntarily elect early retirement. The amount of the bonus is calculated at a percentage of the faculty member's final annual salary. The percentage varies upward in line with increasing years of full-time service (12-17) and downward in line with advancing age (55-62). Except for a one-time opportunity, when the plan was started in 1979, faculty members over age 62 do not receive any retirement bonus. It is thus evident that identically situated employees receive a reduced bonus, or no bonus whatsoever, solely on the basis of age. See the table of bonuses at page 5 of the Presentation Memorandum.

Because of the per se age discrimination, I would view Respondent's plan as unlawful unless it qualifies as an exempt "employee benefit plan" within the meaning of ADEA Section 4(f)(2). However, as that phrase is defined in 29 CFR §860.120(a), the plan cannot qualify because the benefit reductions are not justifiable on the basis of actuarial cost considerations. See Alford v. City of Lubbock, 664 F. 2d 1263, 1271-72 (5th Cir. 1982), cert. den. 50 U.S.L.W. 3916 (June 27, 1982), holding that the exemption did not justify an age based denial of sick-pay ~~benefits, since~~ age was not an actuarial cost consideration. See also EEOC v. Curtiss-Wright Corp., not reported (D. N.J., No. 81-2376, decided 4/12/82), transcript of bench opinion at pp. 37-41, holding that the exemption did not justify an age-based denial of severance pay, since age was not an actuarial cost consideration.

Notwithstanding the per se age discrimination, and the inapplicability of the Section 4(f)(2) exemption, it can be argued that the retirement incentive plan is lawful because the employee's decision to retire at a given age or to continue working is strictly voluntary. Indeed, the former General Counsel, Michael Connolly, took the view that any age-based variable retirement bonus is lawful if non-coercively offered and voluntarily accepted. See attached materials in re the former G.C.'s proposed opinion letter. I disagree with that view, which was also opposed by the Offices of Field Services and Policy Implementation. See attached materials.

In my opinion, this case presents a strong and sympathetic vehicle for presenting a novel and controversial issue not only to the Commission but also to the courts. Accordingly, I concur in the litigation recommendation. As noted above, I also concur in the recommendation to seek monetary damages, although the Presentation Memorandum (VIII at p. 9) should be corrected to show that the approximate gross amount of $118,000 does not take into account mitigation or failure-to-mitigate.

However, because the issue is certainly novel and arguably close, I do not agree with the recommendation to seek liquidated (double) damages for alleged "willful" violations. (The Presentation Memorandum (IX at p. 9) erroneously sees an absolute connection between alleging willful violations for purposes of the three-year statute of limitations and seeking liquidated damages. This error, too, should be corrected -- regardless of whether liquidated damagees are sought.)

Finally, in recommending this case for litigation, it is relevant to note that there are no disputed facts. Thus, it is probably irrelevant whether the Commission demands a jury trial (see P.M., X at p.9), since the case will very likely be decided on a motion for summary judgment. Such a course would make this case an inexpensive one to litigate and, if necessary, a clean one for appeal.

PRESENTATION MEMORANDUM

I. INTRODUCTORY INFORMATION

1. Parties

   a. Respondents

   Employer: Monroe Community College

   Union: Faculty Association of Monroe Community College

   b. Defendants

   Employer: Monroe Community College

   Union: Faculty Association of Monroe Community College

   c. Charging Party

   Francis Litzinger

2. Commission Charge No. 023-80-8070

3. Location of Facility and Union Address

   100 East Henrietta Road, Rochester, New York 14623

4. Size of Workforce

   Employer Community College has approximately 360 full time faculty members. The Faculty Association of Monroe Community College is the union and collective bargaining representative of college faculty members.

5. Summary of the Proposed Suit

   Suit will seek to rectify the retirement incentive plan at respondent college which pays increasingly lesser amounts to voluntarily retiring faculty, based on their age.

II. NATURE OF RESPONDENTS' BUSINESS

1. Description

   Employer: The employer is State University of New York Community College in Rochester, New York.

   Union: The union respondent is the bargaining representative for the employer's teachers, which negotiated the terms of the discriminatory retirement incentive plan at issue with the employer.

2. Jurisdiction

   Employer: The community college falls within Section 11(b) of the ADEA definition of employer as an agency or instrumentality of a State.

   Union: The respondent union is a labor organization within the meaning of Section 11(d) of the ADEA.

III. ADMINISTRATIVE RECORD

1. Summary Case Processing Chronology

Charge was filed with the EEOC on March 17, 1980, alleging age discrimination due to respondents' age-based retirement incentive plan. Initial investigation was undertaken by EOS Anna Stathis. A full investigation by Ms. Stathis proceded upon my issuance of a legal opinion recommending same. (See Attachment A). The statute of limitations was tolled by letter as of December 8, 1981. The case had been referred to the state FEPA on March 17, 1980. The letter from the Regional Attorney requesting any further position statements by the respondents was mailed on June 11, 1982 and response was subsequently received on June 28, 1982. (See Attachment B.)

2. Substance of the Investigation

Investigation revealed that upon negotiation with the union, the governing collective bargaining agreement at the college created a retirement incentive plan for the school years September 1979 through July 1982. The lump sum payment made to voluntary retirees varies upward according to years of service (12-17 years) and downward according to age (55-62 years of age). To date, ten employees have retired from the college over the time period in which the plan has been operative. Four voluntary retirees received lump sum benefits under the plan. All four were over the age of the "optimal" age of 55, thereby receiving lesser benefits due to age. Several other retirees received no retirement incentive, since at the age of retirement they were over the cap age of 62, thereby receiving no benefits due to age. Three of the ten individuals were 65 * at the time of retirement.

3. Conciliation Efforts

Conciliation with respondent college was conducted by its attorney, and the Assistant President of the college. There were oral and written communication both before and after the March 12, 1982 conciliation meeting at the NYDO, between respondent and the EEOC. The college has failed to offer any meaningful settlement for the employees who received lower benefits due to age.

The union has also received all conciliatory communications, and indicated an initial willingness to join the March 12, 1982 conciliation meeting. However, the union failed to attend, and has refused to conciliate claiming the college is responsible for the scheme at issue.

IV. COMPARATIVE SCOPE OF PROCEEDNGS

1. Complaint

The charge stated that the 63 year-old Charging Party did not receive a retirement incentive payment because he was over the cap age of 62 on the incentive plan.

2. Investigation

Same as in III (2) above.

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* Until July 1, 1982, Section 12(d) of the ADEA permits the compulsory retirement of tenured employees by an institution of higher education at age 65. Thus there is no violation alleged for these employees.

3. Proposed Suit

The suit will allege violation of Section 4(a)(1) 4(a)(2), 4(c)2, and 4(c)(3) of the ADEA based on the receipt of lesser retirement incentive lump sum benefits by the seven employees that retired early due to age.

V. OTHER RELATED ACTIONS

1. Other suits against Respondents

None known by EEOC.

2. Pending Charges

None evident in file.

3. Prior Conciliation Agreements

none evident in file.

VI. ISSUE

Whether a voluntary retirement incentive plan which pays less to voluntary retirees as their age increases violates the ADEA.

VII. PROOF

1. Factual Basis

There are only minimal factual issues in this case, pertaining to individual employees' choice of early retirement. The facts that the early retirment plan exists, and the terms thereof, are embodied in the Monroe Community College collective bargaining agreement for September 1, 1979 to August 31, 1982. Proof of this case will therefore be an essentially legal argument, perhaps subject to decision on a motion for summary judgment.

The plan establishes rates at which early retiring faculty receive lump sum incentive payments. The rate is that percentage of the professor's last annual salary. As stated previously herein, the rate goes up according to years of service and downward according to age.

The table of incentives is as follows:*

Number of years of full-time service before year of retirement	AGE DURING YEAR OF RETIREMENT							
	55	56	57	58	59	60	61	62
17	100	95	85	72	62	50	40	30
16	98	90	80	67	57	45	35	25
15	95	85	75	62	52	40	30	20
14	90	80	70	57	47	35	25	15
13	85	75	65	52	42	30	20	10
12	80	70	60	47	37	25	15	10

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* The parameters of the incentive are due to the (a) the minimum number of years of service necessary for tenure, and (b) the minimum age for early retirement. Seventeen is the highest number of years of service because that is the length of time for which the college was in existence.

In addition, for a four-month period after the plan became effective, faculty over the age of 55 with at least 10 years of service had a four-month period in which they were eligible for an early retirement incentive payment for up to 30% of their last year's salary.

On its face this plan gives smaller benefits to employees between the ages of 55 and 62, as age increases. In addition, those over the age of 62 were allowed only an initial minimal period of the three effective years of the contact to choose an also smaller benefit (i.e. maximum 30%, as opposed to the maximum rates for younger ages).

The ages, years of service, and any benefit received of retirees at Monroe over the effective period of the plan are listed below. All retirees under the age of 65 are voluntary retirees.

- MONROE RETIREES -

AGE	YEARS OF SERVICE	IP BENEFITS RECEIVED
56	13	yes
57	12	yes
57	13	yes
60	18	yes
62	16	yes
64	15	no
64	19	no
65	13	no
65	15	no
65	18	no

It can be seen, then, that all retirees who did receive benefits received less than the maximum amount allowed for 55-year olds with same years of service. That two retirees over the age of 62 failed to receive any benefits also indicates age-related denial of same.

2. Legal Argument

a. Prima facie Case

Is provision by an employer of voluntary retirement incentive payments which decrease pursuant to age illegal? The terms of the ADEA, Commission policy as enunciated thereunder, and case law support the EEOC position that such a plan is indeed illegal.

ADEA Section 4(a)(1) states that it is unlawful for an employer to discriminate with respect to "compensation, terms, conditions or privileges of employment" because of an individual's age. In the most elemental sense, a retirement incentive plan which decreases pursuant to age is a term or condition of employment within the meaning of 4(a)(1) that is diminished because of an employee's older age.

The plan at issue would therefore be legal under the statute only of it fell within an exception allowed under the Act. That is, the plan would have to be either based on a factor other than age as permitted under ADEA § 4(f)(1), or a bona fide employee benefit plan as defined in ADEA §4((f)(2).

b. **Rebuttal of Defenses Asserted By Respondent**

Respondent college has stated that the age decreasing benefits were based on a legitimate business reason. The argument is that given mandatory retirement at age 65, the younger the teacher, the greater the number of years for which the teacher expects to receive salary. In other words, a 55 year old teacher can expect 10 years of salary, while a 60 year old teacher expects only 5 more years of salary. Therefore, it makes sense that a younger person should be offered more money to retire in the form of an incentive.

The respondent's argument appears to be sensible. It is insufficient, however, to establish that the plan is based on reasonable factors other than age under §4(f)(1). The ADEA was drafted with the intent of foreclosing employers from firing or otherwise dealing with older workers because these workers may cost more. For example, an employer may not discharge an older employee on the sole consideration that the employee is older, has more years with the company, and is therefore more costly to the company in terms of salary.

Likewise with the situation herein: the employer's discretion to act on seeming common dollar-sense has been restricted by age legislation. Congress found that the societal interest in the equal employment of older workers outweighs the employers' interest in always acting on what at first blush may appear to be reasonable business grounds.

Hence, the employer's reason for establishing age-based lesser payments does not fall within the limited scope of the 4(f)(1) defense of "reasonable factor other than age", as may facts showing age as a bfoq.

The second argument by the employer is that the plan falls under the 4(f)(2) exception as a bona fide employee benefit plan.

Commission Field Notes published May 1981, Question 20, put forth the standard to apply in considering whether retirement incentives constitute ADEA violations. In relevant part, the field note states:

> In order to be considered as a "plan" in which age is an actuarially significant factor, a retirement incentive must be an integral part of an employee benefit plan within the meaning of section 4(f)(2) of the ADEA. Therefore, lump sum retirement bonuses per se are not bona fide "employee benefit plans" (see glossary), the cost of which increases actuarially as the age of the employee increases.

Accordingly, a retirement incentive plan must rely on an actuarial basis relating the cost of the plan to the employer because of the employee's age. This may be possible when an incentive plan is made part of the actuarially based pension plan, or at least tied specifically with such a pension plan.

The terms of the retirement incentive plan at issue, however, is not keyed into the pension plan at the respondent college. There is no actuarial cost effect to the employer stated as the basis of the plan. Instead, the college admits that the plan is based on a general picture of how much longer an employee may work, and what then may be a reasonable incentive. This does not constitute the actuarial foundation required by 4(f)(2) to proctect older employees from employers' ideas of the negative worth of age.

The Monroe incentive plan is similar in structure to lump-sum severance pay plans offered by certain companies. Recently, the District Court of New Jersey held a severance plan which excluded employees eligible for full retirement at age 65 to be violative of the ADEA. Since age was a determining factor in establishing the exclusion, the plan was illegal. Equal Employment Opportunity Commission v. Curtiss Wright Corporation (DCNJ April 12, 1982). (See Attachment C.)

In reaching its decision, the court considered whether the severance plan fell under the 4(f)(2) exception as a bona fide employee benefit plan. The court found that the plan did not fit within the intent of §4(f)(2), to protect pension and other such benefit plans specifically based on actuarial data.

The Court likened the severance pay plan before it to the sick-pay plan in Alford v. City of Lubbock 27 EPD §32,386 (5th Cir. 1982). In Lubbock, the employer tried to argue that a payment for accrued sick leave provision which excluded those hired over age 50, fell under 4(f)(2). The pension plan also contained an over-50 exclusion.

The fifth Circuit held that the sick-pay plan was not a §4(f)(2) plan simply because it was promulgated under the same exclusionary term as was the bona fide pension §4(f)(2) plan. As the Court states, "This discriminatory administration of a simple fringe benefit cannot by this means be brought under the protection of Section 4(f)(2)". Supra at p.23, 673.

Similarly, the retirement incentive plan at Monroe Community College fails to meet the standard of an employee benefit plan under §4(f)(2), and is thus illegal under the ADEA.

VIII. DAMAGES

Damages due consist of the difference between the amount paid a voluntary retiree under the plan, and the amount the employee would have received had the sum not been diminished due to age. For seven employees, this amounts to approximately $118,000.

IX. WILLFUL VIOLATION

The violation should be alleged as willful so that there will be no possible statute of limitations problems post-Ricks. (Otherwise, the case could be filed within two years of when the first person failed to receive full benefits). Liquidated damages should be sought based upon the employer's knowledge of discrimination law.

X. JURY TRIAL DEMAND

A jury trial is demanded for this potentially sympathetic age case.

XI. UNIONS

As previously stated, the union is included as a defendant along with the employer. The discriminatory plan was negotiated by the union, and is embodied in the collective bargaining agreement.

XII. CONCLUSION

Litigation is recommended for the reasons set forth above.

Approved by:

William J. Lee

William Lee
Regional Attorney

Virginia Waters

Virginia Waters
Supervisory Trial Attorney

By:
Marcy Schwartz
Trial Attorney

I concur:

Dated:

Edward Mercado
District Director

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

May 9, 1983

MEMORANDUM

TO : Michael A. Middleton

THRU : Daniel M. Williams, Jr.

FROM : Paul D. Brenner PDB

RE : Review of Presentation Memorandum from the New York District Office -- North Tonawanda Bd. of Education, et al.

I concur in the recommendation to litigate this novel ADEA case.

The case involves a collectively bargained retirement-incentive plan. Under that plan, qualified employees who elect early retirement have the option of receiving (in addition to vested pension benefits) a lump sum payment of $10,000 or a package of cash and supplemental retirement benefits of approximately the same value.

The retirement incentive plan was instituted in January 1979. Until September 30, 1979, all retirement-eligible employees (i.e., at least age 55 and at least 20 years of service) could participate in the plan. However, since that date, participation has been limited to retirement-eligible employees who are at least age 55, but not over age 60. The plan thus excludes from participation all retirement-eligible employees aged 61 through 69.

The district office proposes to file an action requiring Respondents to permit retirement-eligible employees aged 61-69 to participate in the incentive plan and to recover monetary damages for at least five aggrieved individuals. (Apparently, the district office did not consider the legality of excluding non-retirement-eligible employees aged 40 to 69 from participation in the plan; and, that question is therefore not at issue in this case.)

I agree that the retirement incentive plan violates Section 4(a)(2) of the ADEA, because of the age-based exclusion of otherwise eligible employees. I also agree that the plan is not exempt by virtue of the Section 4(f)(2) exception for employee benefit plans, since there is no apparent actuarial justification for the age-based exclusion. See 29 CFR §860.120(a).

Although I accordingly concur in the recommendation to litigate this case, the following should be noted:

1. There is no ADEA caselaw on the legality of retirement incentive plans.
2. The Commission has not yet taken any position on the legality of such plans.
3. SCEP is now considering ADEA interpretive guidelines, in the form of proposed questions-and-answers, dealing with such plans.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. NORTH TONAWANDA PUBLIC SCHOOLS, NORTH TONAWANDA UNITED TEACHERS, AND NORTH TONAWANDA SCHOOL ADMINISTRATORS, Defendants.	COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1337, 1343, and 1345. This is an action authorized and instituted pursuant to Section 7(b)~~, 29 U.S.C. 626(b),~~ of the Age Discrimination Employment Act of 1967, as amended, 29 U.S.C. Section 621, et seq., (hereinafter referred to as the "ADEA"), which incorporates by reference sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201, et seq.

2. The unlawful employment practices herein alleged were committed within the State of New York and the instant judicial district.

PARTIES

3. Plaintiff Equal Employment Opportunity Commission, (hereinafter the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA, and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. Section 626(b), as amended, by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

4. Since at least January 1, 1979, Defendant North Tonawanda Public Schools has continuously been and remains a public school district of the State of New York ~~and therefore an employer~~ as defined by ADEA §11(b), an "agency or instrumentality of a State" and an "employer" 29 U.S.C. §630(b).

5. Since at least January 1, 1979, Defendant North Tonawanda United Teachers has continuously been and remains the

representative for collective bargaining and grievances for faculty in Defendant North Tonawanda Public Schools, thereby falling within the definition of "labor organization" of ✓ ADEA §11(d), 29 U.S.C. §630(d)

6. Since at least January 1, 1979, Defendant North Tonwanda Schools Administrators had continuously been and remains the representative of school administrators for collective bargaining and grievances in the Defendant North Tonawanda Public Schools, thereby falling within the definition of "labor organization" ✓ of ADEA §11(d), 29 U.S.C. §630(d)

STATEMENT OF CLAIMS

7. Prior to the instutition of this lawsuit, representatives of the Commission attempted to eliminate the unlawful employment practices hereinafter alleged and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion pursuant to Section 7(b) of the ADEA, 29 U.S.C. 626(b).

8. Since at least June 1, 1980 and continuously to the present, Defendant North Tonawanda Public Schools has willfully engaged in unlawful employment practices in violation of §4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), by discriminating against employees, including but not limited to those on Exhibit A, who were then between the ages of 60 and 70, with respect to their compensation, terms, conditions or privileges of employment, by an early retirement incentive plan embodied in the collective bargaining agreement in effect July 1, 1980 to June 30, 1983, entered into with Defendant labor organization North Tonawanda United Teachers which by its terms pays no benefits because of age, (hereinafter "the teachers' early retirement incentive plan").

9. Since at least June 1, 1980 and continuously to the present, Defendant North Tonawanda Public Schools has willfully engaged in unlawful employment practices in violation of §4(a)(1) of the of the ADEA, 29 U.S.C. 623(a)(1), by discriminating against employees, who where then between the ages of 60 and 70, with respect to their compensation, terms, conditions or privileges of employment, by the early retirement incentive plan embodied "in the collective bargaining agreement, in effect July 1, 1981 February 1, 1982 to and July 1, 1982 to June 30, 1983, entered into with Defendant labor organization

North Tonawanda Schools Administrators', which by its terms pays no benefits because of age, (hereinafter the "school administrators early retirement incentive plan").

10. Since at least June 1, 1980, and continuously to the present, Defendant North Tonawanda Public Schools has willfully engaged in unlawful employment practices in violation of §4(a)(2) of the ADEA, 29 U.S.C. 623 (a)(2), by discriminating against employees who were than over the age of 60, including but not limited to those listed on Exhibit A, by limiting, segregating or classifying those employees in ways which deprived them of employment opportunities or otherwise adversely affected their status as employees due to the teachers' early retirement incentive plan.

11. Since July 1, 1981 to February 1, 1982 and July 1, 1982 to the present, Defendant North Tonawanda Public Schools has willfully engaged in unlawful employment practices in violation of §4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), by discriminating against employees who were at the relevant times over the age of 60, by limiting, segregating, or classifying these employees in ways which deprived them of employment opportunities or otherwise adversely affected their status as employees due to the school administrators' early retirement incentive plan.

12. Defendant North Tonawanda United Teachers has since at least June 1, 1980, and continously up to the present, willfully engaged in unlawful employment practices at Defendant North Tonawanda Public Schools in violation of §4(c)(2) of the ADEA, 29 U.S.C. §623(c)(2), by limiting, segregating or classifying its membership in a way which deprived individuals over age 60 (including but not limited to the employees listed on Exhibit A) of employment opportunities, or otherwise adversely affected such individuals' status as employees pursuant to the teachers' early retirement incentive plan, as negotiated by Defendant North Tonawanda United Teachers.

13. Defendant North Tonawanda United Teachers has since at least June 1, 1980, and continously up to the present, willfully engaged in unlawful employment practices at Defendant North Tonawanda Schools in violation of §4(c)(3) of the ADEA, 29 U.S.C. §623(c)(3), by causing or attempting to cause an employer to discriminate against an individual in violation of §4(a) of the ADEA, including but not limited to those individuals listed

on Exhibit A, by negotiating the terms of the herein alleged discriminatory teachers' early retirement incentive plan with the Defendant employer.

14. Defendant North Tonawanda Schools Administrators has since July 1, 1981 to February 1, 1982, and July 1, 1982 and continuously up to the present, willfully engaged in unlawful employment practices at Defendant North Tonawanda Public Schools in violation of §4(c)(2) of the ADEA, 29 U.S.C. §623(c)(2), by limiting, segregating or classifying its membership in a way which deprived individuals over age 60 of employment opportunities, or otherwise adversely affected such individuals' status as employees pursuant to the administrators' early retirment incentive plan, as negotiated by Defendant North Tonawanda Schools Administrators.

15. Defendant North Tonawanda Schools Administrators has since July 1, 1981 to February 1, 1982 and July 1, 1982 to the present, willfully engaged in unlawful employment practices at Defendant North Tonawanda Public Schools in violation of §4(c)(3) of the ADEA, 29 U.S.C. §623(c)(3), by causing or attempting to cause an employer to discriminate against an individual in vilolation of §4(a) of the ADEA, by negotiating the terms of the herein alleged discriminatory administrators' early retirement incentive plan with the Defendant employer.

16. The effect of the policies and practices complained of in paragraphs 8 through 15 hereof has been to deprive persons of equal employment opportunities and otherwise adversely affect their status as employees because of their age.

17. A judgment restraining violations of the ADEA and requiring the retroactive making whole of employees who have suffered as a result of age discrimination is specifically authorized by 29 U.S.C. 626(b) and 29 U.S.C. 217.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a judgment permanently enjoining Defendants, their officers, agents, employees, successors, assigns and all persons in active concert or participation with them from violating the privisions of Section 4 of the ADEA and from engaging in any employment practice which discriminates because of age.

B. Order Defendants to make whole those persons adversely affected by the unlawful employment practices described herein, by providing the affirmative relief necessary to eradicate the effects of their unlawful employment practices.

C. Order Defendants to make whole those persons adversely affected by the unlawful employment practices described herein by enjoining the continued withholding of amounts of back wages plus interest owing as a result of the violation of the ADEA, in amounts to be proven at trial pursuant to Section 17 of the Fair Labor Standards Act. In addition to order an equal sum as liquidated damages, pursuant to Section 16(c) of the Fair Labor Standards Act, to the employees listed on Exhibit A attached hereto.

D. Grant such further affirmative relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

JURY DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

DAVID L. SLATE
General Counsel

MICHAEL N. MARTINEZ
Deputy General Counsel

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EXHIBIT A

Sarah Cipriano

Mary Henry

Alice Miller

Jeune Miller

Walter Sokol

UNITED STATES GOVERNMENT
# memorandum

DATE: APR 17 1983

REPLY TO ATTN OF: Marcy Scnwartz, Senior Trial Attorney-NYDO
THRU: Spencer H. Lewis, Regional Attorney
Virginia Waters, Supervisory Trial Attorney

Subject : Request for Litigation Approval

023-81-0258 Cipriano v. No. Tonawanda Bd. of Education
023-81-0259 Cipriano v. No. Tonawanda United Teachers
023-81-0260 Miller v. No. Tonawanda Bd. of Education
023-81-0261 Miller v. No. Tonawanda United Teachers

To: Michael Middleton
Associate General Counsel

Enclosed please find the Presentation Memorandum and draft Complaint in the above case.

The Statute of Limitations arguably runs on June 18, 1983, three years after the date of notification to employees of the teachers' early retirement incentive plan at issue.

PRESENTATION MEMORANDUM

I. INTRODUCTORY INFORMATION

1. The statute involved is the ADEA. The case is an ELI.

2. Parties

a. Respondents

Employer: North Tonawanda Public Schools
175 Humphrey Street
North Tonawanda, New York 14120

Unions: North Tonawanda United Teachers
74 Webster Avenue
North Tonawanda, New York 14120

North Tonawanda Schools Administrators
Association, Gilmore School
789 Gilmore Avenue
North Tonawanda, New York 14120

b. Defendants

Same as Respondents.

c. Charging Parties

Sarah Cipriano
Jeanne M. Miller

3. Summary of Proposed Suit

Suit will seek to correct the violation of the ADEA presented by retirement incentive plans which foreclose such benefits from voluntary retirees over the age of 60. In addition, back pay of those sums will be sought to teachers and administrators who have already retired without the retirement incentive benefit, due to age.

4. Commission Charge Nos.

023-81-0258 (Cipriano v. North Tonawanda Bd. of Education)
023-81-0259 (Cipriano v. North Tonawanda United Teachers)

023-81-0260 (Miller v. North Tonawanda Bd. of Education)
023-81-0261 (Miller v. North Tonawanda United Teachers)

5. Location of Facility

North Tonawanda Public Schools
175 Humphrey Street
North Tonawanda, New York 14120

6. Size of Workforce

Respondent school district employs over 100 employees.

7. Nature of Respondents' Business

Employer: The employer is the North Tonawanda Public Schools which employs personnel for said school district.

Unions: Respondent Unions represent the teachers employed by the school district, and the administrators employed by the district, respectively.

II. ADMINISTRATIVE RECORD NARRATIVE/JURISDICTION

1. Summary Case Processing Chronology

a. Date Charge Filed

Charges were filed on May 26, 1981. Copies are attached hereto at letter B.

b. Deferral/Referral History

The file contains no copy of the refereral letter to New York State. Said referral was probably made, as referrals are routinely done on age cases in this office.

c. Date of Decision

Letters of violation went out to the school district and teachers' union on April 27, 1982. The letter of violation to the to the school administrators' union is dated June 14, 1982.

d. Date of Notification of Conciliation Failure

7(b) letters went out to the school district and teachers' union on May 27, 1982. The 7(b) letter to the administrator union is dated June 14, 1982. Conciliation failed upon the receipt of a letter from respondents' attorney declining to conciliate further. The letter is dated November 22, 1982.

e. Substance of the Investigation

Investigation revealed that two collectively bargained retirement incentive plans, one for teachers and one for administrators, are in effect in the subject school district. The teachers' plan is in effect for the period July 1, 1980 through June 30, 1983. The plan applying to administrators is effective over the same general period, July 1, 1981 to February 1, 1982, and July 1, 1982 to June 30, 1983. Both plans though providing different pay-out benefits, limit their application to bargain unit members employees with at least 20 years of service, and between the ages of 55 and 60.* Teachers were notified of the instution of their plan on June 18, 1980.

Teachers and school administrators over the age of 60 are thus foreclosed from receiving any early retirement incentive because of their older age. Five teachers over the age of 60 who early retired accordingly failed to receive any retirement incentive payment. Nine more teachers who are still employed have or will become ineligible to receive the benefit due to their post-60 age. Thus far, no administrators over age 60 have retired early nor are there any administrator presently ineligible for the incentive benefit.2/

---

* Retirement incentives provided are as follows:

For teachers, the retiring teacher may choose to receive from the Board of Education either:

1. The sum of $10,000, or
2a. The sum of $2,000 and
b. The sum of $50 additional for each year of service beyond 20, and
c. Health insurance benefits to age 65.

Administrators receive upon covered election of early retirement: a lump sum payment of $2,000 plus an additional $50 for each year of service beyond 20 years.

2/ Paranthetically, all teachers over age 55 were eligible for an early retirement incentive under a collective bargaining provision in effect January 1979 to June 30, 1980. However, eligibility for teachers over 60 was cut off as of September 30, 1979, allowing a shorter time period for older employees to take the incentive. This is a moot point as to back pay, as no teacher over the age of 60 retired during the September 30, 1979 to June 30, 1980 cut-off period.

Conciliation was engaged in by the school and the two unions. A meeting was held convenient to the respondents in upstate New York in June of 1982. There was also written communications and telephone conversation over an approximate six-month period May-November 1982. Respondents submitted information as requested by the Commission. Respondents maintained that their early retirement incentive plans were legal, resulting in a failure of conciliation. The substance of Respondents' position is discussed below.

f. Jurisdiction

Employer: The school district falls within Section 11(b) of the ADEA definition of employer as an agency or instrumentality of a state.

Unions: The two respondent unions are labor organizations within the meaning of Section 11(d) of the ADEA.

Notice under the ADEA was given to all respondents. While the plans at issue represent continuing violations, it would be prudent to file the suit by June 18, 1983 so that suit will have been filed within three years of notice to employees of the Teachers' Plan.

2. Comparative Scope of Decision and Suit

The bases and issues of the charge and proposed suit are the same.

The administrative procedure consist of the investigation and conciliation of the collectively bargained retirement incentive plans entered into by the Respondent school district with the teachers' union, and the administrators' union; each disallowing such benefits to employees over the age of 60.

The suit will thus allege violation of Sections 4(a)(1), 4(a)(2), 4(c)(2), and 4(c)(3) of the ADEA based on the illegally age biased retirement incentive plans. Investigation and conciliation based upon respondents' expected defenses as discussed in substance below, was also conducted.

III. OTHER RELATED ACTIONS

1. Other suits against Respondents

None known by EEOC.

2. Other pending Charges

None evident in file.

3. Prior Conciliation Agreements

None evident in file.

IV. PROOF

1. Factual Basis

The facts in this case are not in dispute. The early retirement incentive plans at issue are set forth in collective bargaining agreements. Their provisions are therein clearly stated. (See Attachment A). The school has provided the EEOC with relevant personnel information such that employees who have financially suffered due to their age under the plans will also be simple to prove. Factual proof is amenable to stipulation of facts and submission of documents, making the case a likely vehicle for disposition on a motion for summary judgment. Legal proof of this case is the more difficult element, given that this suit would seek adjudication of an issue not yet decided on all four corners by the Courts.

Please see Substance of the Investigation, Part III (2) hereinabove, for a factual review of the structure of the plans at issue, and a breakdown of affected employees.

2. Legal Argument

a. The Prima facie Case

ADEA Section 4(a)(1) states that it is unlawful for an employer to discriminate with respect to "compensation, terms, conditions, or privileges of employment" because of an individual's age. At issue is a benefit plan which on its face forecloses benefits to employees over the age of 60. By the plan's very terms, employees are cut off from incentive payments due directly to age, in contravention of the plan language of Section 4(a)(1).

The plan at issue would therefore be legal under the statute only of it fell within an exception allowed under the Act. That is, the plan would have to be either based on a factor other than age as permitted under ADEA §4(f)(1), or a bona fide employee benefit plan as defined in ADEA §4(f)(2).

b. Discussion of Respondents' Defenses

The Respondents put forth four explanations for the format of the retirement incentive plans. The first explanation is immediately recognizable as impermissable under the ADEA. This explanation is that retirement incentive plans enable the District to infuse the staff with new personnel allowing for a more balanced workforce. A rationale calling on the virtue of "new personnel" smacks of age animus and does not constitute a factor other than age.

Second, the respondents argue that since the incentive plans were negotiated by the unions and the employer district, the affected employees had an earlier opportunity to voice objection to the provisions. While this may be the case, violation of the ADEA nevertheless exists. Discriminatory employment terms are not shielded from the law by virtue of their embodiment in a collective bargaining agreement.

Third, respondents point out that all teaching staff, regardless of age, had the opportunity to take part in the previous early retirement incentive plan, during the period January 1979 through September 1, 1979. However, there is still inequality of treatment of older employees in that since September 1, 1979, those over 60 were barred from availing themselves of the benefits allowed by that incentive plan. Furthermore, the teachers' plan presently at issue was instituted July 1, 1980, having never authorized participation by those over 60.

Finally, respondents argue that encouraging retirement of younger workers who have the expectation of longer future service, results in cost savings for the school district, and that such a plan must logically be age-related in order to foster retirement of younger personnel.3/

Such reasoning is insufficient, however, to establish that the plan is based on reasonable factors other than age within the meaning of §4(f)(1). The ADEA was drafted with the intent of foreclosing employers from firing or otherwise dealing with older workers because these workers may cost more. For example, an employer may not discharge an older employee on the sole consideration that the employee is older, has more years with company, and is therefore more costly to the company in terms of salary. Congress found that the societal interest in the equal employment of older workers outweighs the employer's interest in always acting on what at first blush may appear to be reasonable business grounds.

3/ The plans are geared to the base age of 55 as that is the age at which teachers and administrators become eligible for voluntary retirement under the New York State Teachers Retirement System.

That the school may save more money by the retirment of younger workers does not fall within the limit scope of §4 (f)(1) defense of "reasonable factor other than age".

The reasoning enunciated by the respondents also falls short of establishing the Section 4(f)(2) defense of a bona fide employee benefit plan.

Commission Field Notes published May 1981, Question 20, put forth the standard to apply in considering whether retirement incentives constitute ADEA violations. In relevant part, the field note states:

> In order to be considered as a "plan" in which age is an acturially significant factor, a retirement incentive must be an integral part of an employee benefit plan within the meaning of section 4(f)(2) of the ADEA. Therefore, lump sum retirement bonuses per se are not bona fide "employee benefit plans" (see glossary), the cost of which increases actuarially as the age of the employee increases.

Accordingly, a retirement incentive plan must rely on an actuarial basis relating the cost of the plan to the employer because of the employee's age. This may be possible when an incentive plan is made part of the actuarially based pension plan, or at least tied specifically with such a pension plan.

The terms of the retirement incentive plans at issue, however, are not keyed into the pension plan at the respondent school district. In addition, there is no actuarial cost effect to the employer stated as the basis of the plans. Instead, the college admits that the plan are based on a general picture of how much longer an employee may work, and what then may be a reasonable incentive. This does not constitute the actuarial foundation required by 4(f) (2) to protect older employees from employers' ideas of the negative worth of age.

The retirement incentive plans here are similar in structure to lump-sum severance pay plans which have been adjudged to be in violation of the ADEA by two separate District Courts. In said severance pay cases, severance pay was denied by defendants to employees eligible for retirement. Though age was not a specifically emunicated factor in determining severance pay eligibility. the two cases hold that since age is tied in with retirement eligibility, the disallowance of severance pay based on retirement status is illegally age - related. EEOC v. Bordens, Inc. (D.C. Arizona 1982) 30 FEP Cases 933, on appeal, EEOC v. Curtiss - Wright Corporation, Slip Opinion, (D.C. N.J., April 12, 1982).

Both courts found that the employers failed to establish a business necessity defense, or that the plans fell within the ambit of Section 4(f)(2). As to the failure to establish a section 4(f)(2) defense, the court in Bordens (supra at 935) states, "assuming defendant's retirement plan is a bona fide benefit plan under (f)(2), the record gives no indication that the severance pay policy is an integral part of it."

The retirement incentive plans under review are also separate entities from the applicable pension plans. Not only are they embodied in local collective bargaining agreements, unlike the district statewide pension plan, but they are also not based on actuarial factors keyed into the pension plan. Therefore, the facially age-biased retirement incentive plans in the respondent school district are not based upon legally supportable rationale pursuant to sections 4(f)(1) or 4(f)(2). The plans are illegal under the ADEA.

V. LACHES

There is no laches problem presented by this suit. The plans are continuing until July 1, 1983. There has been no unreasonable delay at any aspect of the administrative procedure.

VI. IMPACT SECTION

1. Damages

Damages consist of the award of retirement incentive payment to early-retired employees who did not receive such payments due to their age. Assuming option 1 4/ for teachers, this presently amounts to $50,000 for five early retirees, plus interest.5/

2. Costs of Litigation

Litigation of this proposed case should be at minimal cost to the Commission, due to the fact that it is an appropriate vehicle for a Summary Judgment Motion.

VII. JURY TRIAL DEMAND

1. 16(c)is alleged in the draft Complaint. The respondents never claimed that they were unaware of the ADEA.
2. A jury trial is demanded for this potentially sympathetic age case, should a trial result.

VIII CONCLUSION AND RECOMMENDATION

Litigation is recommended for the reasons set forth above.

APPROVED BY:

H Spencer Lewis by VW
SPENCER H. LEWIS, JR.
Regional Attorney

Virginia Waters
VIRGINIA WATERS
Supervisory Trial Attorney

Marcy Schwartz
MARCY SCHWARTZ
Senior Trial Attorney

DATED: APR 17 1983

I concur:

EDWARD MERCADO
District Director

4/ See Attachment A.

5/ Also, if retiring employee chose Option 1, and received the $10,000 lump sum payment in the last calendar year of employment, then if their pension was calculated based on the last five years of salary as permissable under the pension plan, the $10,000 would be included in the final year of salary, thereby increasing the resulting pension.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

May 9, 1983

MEMORANDUM

TO : Michael A. Middleton

THRU : Daniel M. Williams, Jr.

FROM : Paul D. Brenner PDB

RE : Review of Presentation Memorandum from the New York District Office -- North Tonawanda Bd. of Education, et al.

5/10/83
I concur in the recommendation to litigate. The window during which an employee may retire may prove to be troublesome but since the Q+A's on early retirement are apparently coming somewhere we might as well lead by proposing litigation. [illegible]

I concur in the recommendation to litigate this novel ADEA case.

The case involves a collectively bargained retirement-incentive plan. Under that plan, qualified employees who elect early retirement have the option of receiving (in addition to vested pension benefits) a lump sum payment of $10,000 or a package of cash and supplemental retirement benefits of approximately the same value.

The retirement incentive plan was instituted in January 1979. Until September 30, 1979, all retirement-eligible employees (i.e., at least age 55 and at least 20 years of service) could participate in the plan. However, since that date, participation has been limited to retirement-eligible employees who are at least age 55, but not over age 60. The plan thus excludes from participation all retirement-eligible employees aged 61 through 69.

The district office proposes to file an action requiring Respondents to permit retirement-eligible employees aged 61-69 to participate in the incentive plan and to recover monetary damages for at least five aggrieved individuals. (Apparently, the district office did not consider the legality of excluding non-retirement-eligible employees aged 40 to 69 from participation in the plan; and, that question is therefore not at issue in this case.)

I agree that the retirement incentive plan violates Section 4(a)(2) of the ADEA, because of the age-based exclusion of otherwise eligible employees. I also agree that the plan is not exempt by virtue of the Section 4(f)(2) exception for employee benefit plans, since there is no apparent actuarial justification for the age-based exclusion. See 29 CFR §860.120(a).

Although I accordingly concur in the recommendation to litigate this case, the following should be noted:

1. There is no ADEA caselaw on the legality of retirement incentive plans.
2. The Commission has not yet taken any position on the legality of such plans.
3. SCEP is now considering ADEA interpretive guidelines, in the form of proposed questions-and-answers

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

November 10, 1983

MEMORANDUM

TO : Odessa Shannon, Director
Office of Programs Operations

FROM : James N. Finney, Director
Systemic Programs

SUBJ : Designation of Authority to Initiate Age
Discrimination Investigations

Pursuant to 29 C.F.R. Section 1626.15(a) the Commission has authority to investigate violations of the Age Discrimination in Employment Act. In the exercise of these investigatory powers Section 1626.15(e) authorizes the Director of the Office of Programs Operations or a designee to initiate such investigation. It is requested for the following reasons that the Director of Systemic Programs be designated to initiate an investigation of the Xerox Corporation, and future ADEA investigations of matters coming to the attention of Systemic Programs.

Earlier this year Systemic Programs established a Intervention Task Force that monitors federal courts nationwide for private Age Discrimination in Employment Act and Title VII litigation for possible interventions and or direct lawsuits. As a result of this monitoring program the case of Lusardi v. Xerox Corporation was discovered. Our initial position was to request authority for intervention, however, because of the fact that the plaintiffs are now represented by two different law firms, we think that pursuing this case as an intervenor could possibly create a great diversity of opinions and interest. However, if the Commission initiates an investigation, files a direct suit and moves to consolidate, we can stay involved in this case but with independence to pursue our particular interest without infringing upon those of the plaintiffs.

The information we have now about Xerox and the information that will be made available to us by the plaintiffs within the next two weeks, indicate that Xerox has serious violations of the Age Act as it relates to the Lusardi plaintiffs. In our limited contact with charging parties they indicate that there are many other Xerox age violations, and affected persons who are not included in the Lusardi litigation. We think our investigation can verify these allegations.

The investigation of Xerox is appropriate for Systemic Programs Legal Enforcement & Coordination to initiate for several reasons. The Intervention Task Force within this office learned about this private lawsuit. The limited evidence developed indicates that age discrimination violations exist nationwide and that the Commission should be involved. This office would direct and conduct any litigation which results from the investigation. Although there are charges in several field offices, no office has initiated a systemic type investigation. Because of the size and multi-state operations of the Xerox Corporation we think it is essential that an action against Xerox should be nationwide with the direction, coordination and policy developments coming out of headquarters. Our immediate purpose is to conduct a limited investigation, and coordinate the new data with information currently in our possession. We will next move toward an early conciliation. If conciliation fails, we would be ready to quickly recommend a direct lawsuit.

As the Intervention Task Force uncovers other ongoing litigation, it is highly possible that similar situations will come up in the future. Moreover, Systemic Programs is now required under its assigned goals and objectives to develop ADEA litigation. Therefore, we request that the Director of Systemic Programs be designated authority to initiate future investigations of violations of the Age Discrimination in Employment Act. Having the investigative designation authorization in place would effectively expedite Systemic Programs' ability to target and develop appropriate ADEA litigation vehicles.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

November 10, 1983

To: James N. Finney
Director, Systemic Programs

Thru: Leroy T. Jenkins, Jr.
Director, LEC

Ronald L. Oleson
Supervisory Trial Attorney

From: Carlton L. Preston
Senior Trial Attorney

Judith Mathis
EOS

Subject: Recommendations for Action in Xerox Case and in Future ADEA Enforcement

I. Recommendations

After analyzing the evidence available through Commission sources and from plaintiffs in Lusardi v. Xerox, and after meeting with plaintiffs' counsel, we recommend that the Commission initiate an investigation with the goal of filing a direct suit against Xerox should conciliation of apparent violations fail. As explained in Secton A. below, filing a direct suit appears in several respects preferrable to intervention in the Lusardi action.

This investigation should be conducted by Legal Enforcement and Coordination and should be launched after receipt of personnel information regarding terminations and hires to be made available to the Lusardi plaintiffs in early November. It is anticipated that with this information we could determine whether to seek authorization to file a direct suit.

In addition, we recommend that the Director of the Office of Program Operations designate the Director of Systemic Programs to carry out her authority to initiate direct investigations of possible ADEA violations. This authority, provided for in Section 7(b) of the Act and in the Commission's procedural regulations, 29 C.F.R. §1624.15(e)(1983), would be immediately useful for the Xerox case. Such designation of authority would enable Systemic Programs in the future to quickly act on receipt of information regarding apparent violations of the Age Discrimination in Employment Act.

A. Direct Suit Compared to Intervention

Developments in this case since we first considered becoming involved have necessarily altered our view of the possible scope of the lawsuit and the strategies we might pursue in its prosecution. After discussions with counsel from the two plaintiff law firms so far involved in the lawsuit against Xerox, with Dan Williams, and after considering the merits and disadvantages of intervention in Lusardi v. Xerox, we have concluded that filing a direct suit, along with a motion to consolidate the two suits, would preserve the advantages we would secure through intervention and would avoid possible disadvantages and frustrations inherent in the position of intervenor.

Plaintiffs' attorneys appear to be competent, articulate and strong advocates. Conceivably, much energy could be spent in arguing for different points of view among the parties plaintiff. In addition, a direct suit would preserve our independence through the litigation and avoid potential conflicts in issues where private plaintiffs' interests and ours may not coincide, especially in those issues concerning future affirmative action. Through consolidation of the suits, we retain the advantages of sharing discovery and remaining before the judge in Lusardi, before whom plaintiffs' attorneys and the Director of LEC have appeared and whom they hold in high esteem.

Plaintiffs' attorneys have viewed favorably the Commission's possible intervention. Though they prefer that we intervene rather than file a direct suit, our discussions with them indicate they will continue to be cooperative and that they would share the burdens of discovery should our suits be consolidated. These attorneys realize that the Commission's suit will terminate the rights of others to bring actions. However, they plan to represent at most the 135 people who have already contacted them, and have initiated the appropriate communication with those people. Our lawsuit would not expand the scope of the issues of their suit; however, without the expertise and resources of the Commission the private plaintiffs' ability to aggressively represent the remaining 4000 potential plaintiffs is doubtful. Defendants have shown, in hiring two outside law firms to represent them, that they intend to commit considerable resources to the defense of this suit.

B. Investigation

The Age Discrimination in Employment Act requires that investigation and an attempt at conciliation by the Commission precede the filing of a lawsuit. Plaintiffs' counsel have advised that Xerox has agreed to provide, in response to interrogatories, a computer listing of all employees terminated and hired since May 1980, by employee number, date of birth, date of hire, and by date of termination. In addition, they will provide the number of employees at the beginning and end of the period. This information is to be for employees of all Xerox divisions, but will not include Xerox subsidiaries. Xerox has agreed to provide this information to plaintiffs by November 11, 1983.

Because plaintiffs' attorneys have offered to make this information available to us as soon as they receive it, and because it would be difficult to actually begin an investigation before that date, we recommend that Systemic Programs formally announce an investigation of Xerox policies and practices regarding possible discrimination on the basis of age after receipt of this information. There is also the chance that the company, which has so far vigorously resisted discovery, would refuse to give up the data to plaintiffs now if we were formally involved.

A hearing in the case, will be held in the near future concerning the defendant's proposed motion for a protective order. Should the court grant the defendant's motion, the plaintiffs would be unable to share the agreed upon information with us. In that event, we would launch our investigation as soon as possible. We believe that Judge Stern is unlikely to allow Xerox such a restrictive protective order. The transcript of the July 11, 1983 hearing indicates that the Judge was not sympathetic to the protective order the defendants were seeking.

II. Designation of Authority to Initiate Direct Investigation

Attached is a proposed memorandum to the Director of the Office of Program Operations which recommends that she designate the Director of Systemic Programs with her authority to initiate investigations and conciliations under the Age Discrimination in Employment Act. This authority is described in the Commission's regulations at 29 C.F.R.§1626.15(e) (1983):

> The District Directors and the Director of the Office of Program Operations or their designees, are hereby delegated authority to exercise the powers enumerated in §1626.15 (a)(1) through (7) and (b) and (c). The General Counsel

> or his/her designee is hereby delegated the authority to exercise the powers in paragraph (a) of this section and at the direction of the Commission to initiate and conduct litigation.

Paragraphs (a)(1) through (7), (b) and (c) are attached.

The investigation of Xerox is appropriate for Systemic Programs/Legal Enforcement and Coordination to initiate and conduct for several reasons. The Intervention Task Force within this office learned about the private lawsuit and developed the evidence showing this case to be one in which the Commission should be involved. This office will conduct any litigation which results from the investigation. Although there are charges in the field, they are in several offices and no office has undertaken a systemic type investigation of them. Because action against Xerox should be nationwide, direction, coordination and policy development from headquarters is essential. The purpose here is to conduct a limited investigation, and, with the information gained and the data already available, move very quickly to the conciliation stage. We would want to file our suit before discovery has progressed very far.

As the Intervention Task Force uncovers other ongoing suits, it is not unlikely that situations like this one will arise again.

III . Mechanics of Proposed Investigation

Our investigation will begin with analysis of the information to be received from plaintiffs' attorneys. When the authority to initiate a direct investigation is received, a letter to Xerox informing the company of the investigation should be sent from the Director, Systemic Programs. The letter, citing the authority to conduct such an investigation, should be accompanied by a request for information seeking to confirm and amplify data already available. The letter must be phrased in accordance with Section 7(e)(2) of the Act in order to toll the statute of limitations during our conciliation attempt.

Direct ADEA investigations in Commission field offices are initiated pursuant to authority specified in 29 C.F.R. §1624.15 (e) and are conducted according to procedures found in §2019 of the Compliance Manual. The Age Unit in the District Office sets out on form 155 the information upon which the allegation of age discrimination is based and upon which the investigation will be focused. This written summary is then docketed with a charge number. To be consistent with these procedures a charge register will be set up within Legal Coordination and the form will be docketed with the number assigned this unit. This charge form will accompany the letter to Xerox.

Also upon designation of this investigative authority, Systemic Programs should, by memorandum, request that all open age charges against Xerox be sent from the field. It is estimated that there are 38 such charges at present. Consolidating the investigation of these charges would enable us to have one uniform policy in the resolution of the charges.

A meeting with Xerox officials may be appropriate after we send the letter announcing our investigation depending on the company's response to our request for information. We plan to quickly analyze the data submitted by Xerox and promptly begin an attempt at conciliation. We would ask for limited information and will set a three week time limit for the company's response.

IV. Data: Scope of Litigation

A. Information currently known

Sources of data available so far have included EEO-1 Reports, interviews with plaintiffs, documents from charge files, newspaper articles, discussions with plaintiffs' attorneys, and a letter from Xerox to the court dated September 9, 1983. From these sources we have learned that Xerox has conducted several reductions in force in each of several divisions since May 1980. The Lusardi lawsuit includes only salaried workers and the focus of our investigation has also been limited to this group.[1] According to a letter from Xerox to the court, approximately 4000 salaried workers who are 40 or over have been terminated since May 1980. These employees worked in all six Xerox divisions and live in 46 states. The named plaintiffs and persons who have filed charges are concentrated in New York and New Jersey. Xerox headquarters are in Stamford, Connecticut and divisional headquarters are in Stamford, Dallas, and northern California.

Terminated employees held positions including sales representative, systems analyst, engineer and others. Criteria for termination described by Xerox include standards which are clearly non-objective and arbitrary. We have seen that although the company states its selection of employees for termination is based on several factors, such as executive presence, and will be made only by the vice president for personnel, our evidence contradicts the company's claims. Moreover, the original named plaintiffs were summarily fired and were replaced by people who were younger and whose sales records were poorer than plaintiffs'. In addition, Xerox has advertised for applicants for positions from which plaintiffs were terminated. Xerox has not followed its announced procedures in conducting reductions in force and its announced criteria for selection, which include factors such as executive presence, appear to be subjective and not job related. From the potential class of about 4000 persons, 135 have called plaintiffs' attorneys and expressed interest in joining the lawsuit.

B. Information to be sought

We will of course seek to confirm the data already analyzed to be certain our preliminary conclusions are accurate. In addition, we need more information concerning Xerox corporate organization, places and form in which personnel records are kept, and the level from which termination decisions originate. It would be helpful to know the extent to which the number of employees has actually been reduced within each division and within each position classification.

A major portion of our information request to Xerox will seek data regarding age and performance of persons both terminated and not terminated to allow comparisons with our potential class of plaintiffs. In addition, we need to find the criteria used to evaluate and to terminate persons in job classifications other than sales representative. We have preliminary indications that the terminations have impacted differently on people of different ages within the protected age group. Our investigation should seek data to analyze the correlation of terminations to increasing age.

So far evidence indicates the major issue is age based termination resulting from reductions in force. We need data to either confirm or disprove that preliminary conclusion.

C. Information expected from plaintiffs

Plaintiffs have offered to supply to us the computer listings discussed above in Section I. B. as soon as they receive them. Plaintiffs have sent questionnaires to the 135 people who have contacted them and have also agreed to share these responses with us. They have begun to receive these responses within the past few days. Analysis of the answers will provide data as to positions and divisions affected by the reductions in force and should add to our knowledge of selection criteria and procedures used to implement the terminations. Thus, we will be able to further focus and refine our request for information from Xerox. Plaintiffs' attorneys expect to receive most of these responses within the next two weeks and will share them with us at our convenience. They have also agreed to share with us any further information they gain before such time as we might become a party to the litigation.

---

[1] About one third of the approximately 18,000 persons identified in newspaper articles as terminated by Xerox since May 1980 were salaried. We have very little information about the blue collar workers. As of this date none have filed charges with EEOC, nor have any of them contacted plaintiffs' attorneys.

D. Likely conclusions of analysis

It is expected that our analysis will indicate that the Xerox corporation has used age or age based criteria in its selection of persons to be terminated. It is also expected that the correlation of age with termination will increase with advancing age. We believe that analysis will confirm that there are about 4000 potential plaintiffs in the class of salaried persons over 40 and that investigation during discovery would be centered in Stamford, Connecticut, upstate New York and would involve trips to Dallas and to California for depositions and production of documents.

V. Conclusion

It is our conclusion that the Commission should file a direct lawsuit and move to consolidate in lieu of intervention. As stated earlier, the plaintiffs are represented by two different law firms. A Commission intervention would add a third set of lawyers. Three sets of lawyers in an intervention case is not prohibitive per se; however, the possibility exists that at some point during the litigation our particular interests may not be parallel. Given the restrictions inherent as a plaintiff intervenor, such as the requirement that all parties present one position to the court, intervention could be counter-productive. However, if we file a direct suit and move to consolidate with the plantiffs, the Commission will be free to pursue its particular interest without affecting the other plaintiffs' interests.

As a prerequisite for the Commission to file a direct suit we must initiate an investigation and attempt a conciliation. 29 C.F.R. 1626.15 Section (a) establishes the criteria and section (e) establishes who may initiate the investigation. The Director of Program Operations or her designee are authorized to investigate. Therefore, Ms. Shannon must designate Systemic Programs before we can begin our investigation. It would be to our great advantage for the Director of OPO to designate to Systemic Programs her investigatory authority for future ADEA cases. With the Intervention Task Force in operation, there will be many future occasions in which it will necessary to initiate an investigation expeditiously. If Systemic Programs has the authority to investigate, immediate action can begin, thereby saving much valued time which is essential in the on-going cases that are monitored by the Task Force.

The current data that we have, along with the data promised to us by the Lusardi attorneys which we expect to verify through our investigation, will justify a direct lawsuit. We expect this information to more than adequately satisfy the concerns expressed by the Commissioners about the facts contained in our intervention presentation memorandum. Therefore, we request that our recommendations be reviewed and adopted.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

January 12 1984

TO Clarence Thomas
Chairman

THRU Odessa Shannon Director
Office of Program Operations

FROM James N. Finney Director
Systemic Programs

SUBJ Designation of Authority to Initiate Age Discrimination and Equal Pay Investigations

Pursuant to 29 C.F.R. Sections 1626.15(a) and 1620.19(a) the Commission has authority to investigate violations of the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). In the exercise of these investigatory powers, Sections 1626.15(e) and 1620.19(a) authorizes the General Counsel, the District Directors and the Director of the Office of Program Operations or their designees to initiate such investigations. It is requested, that the Director of Systemic Programs be designated the authority to initiate investigations of violations of the ADEA and the Equal Pay Act which come to the attention of Systemic Programs.

Earlier this year Systemic Programs put in place systems to monitor private litigation under Title VII, the ADEA and the Equal Pay Act in federal courts nationwide for possible interventions or direct suits and to target specific companies or industries for possible investigations where warranted. As a result of these monitoring programs, many private lawsuits and Commission charges alleging violations of the above referenced Acts on a classwide basis have been discovered.

Direct investigation by Systemic Programs of possible ADEA and EPA violations are appropriate for several reasons. Charges against a national company are often filed in widely separate District Offices. The possibility that the Company has violated provisions of these Acts nationwide would probably not come to light in any one District office which alone receives just a few charges against that respondent. The charging parties may be unaware of the company's employment practices beyond their facility and fail to allege violations on a company wide basis. It is essential that investigations of possible violations and development of litigation against large national employers be directed and conducted by Systemic Programs and that policy decisions regarding these developing areas of the law emanate from headquarters.

Systemic Programs is required, under its assigned goals and objectives, to develop ADEA litigation. From our monitoring systems we have learned that many allegations of age discrimination by national companies and industries exist. Also, we periodically receive complaints of violations of the EPA. Having the investigative designation authorization in place would expedite Systemic Programs' ability to target and develop appropriate ADEA and EPA litigation vehicles to effectively fullfill our enforcement responsibilities and meet our goals and objectives. Therefore, we request that the Director of Systemic Programs be designated the authority to initiate future investigations of violations of the Age Discrimination in Employment Act and the Equal Pay Act.

Judy

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

February 7, 1984

RECEIVED
2/10/84
#302

TO: James N. Finney, Director
Systemic Programs

FROM: Odessa Shannon, Director
Office of Program Operations

SUBJECT: Delegation of Authority to Initiate Direct Investigation Under 29 C.F.R. §1626.15 (a) Through (e)

This memorandum is to inform you that under 29 C.F.R. §1626.15 (e), you have been delegated authority to initiate a Direct Investigation of the Xerox Corporation with respect to policies and practices which have possibly resulted in discrimination on the basis of age. You may further, under the same regulation, undertake the investigative and administrative actions enumerated in subparts (a) through (d).

This delegation is effective immediately and until further notice.

2/13/84

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

February 7, 1984

Douglas M. Reid
Vice President, Personnel
Xerox Corporation
800 Long Ridge Road
Stamford, Connecticut 06904

Dear Mr. Reid:

The Equal Employment Opportunity Commission is responsible for the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq*. (ADEA). The ADEA protects workers between the ages 40 to 70 from employment discrimination on the basis of age.

Pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §211, and in accordance with its enforcement authority, set out in 29 C.F.R. §1626.15 (1983), this letter is to advise you that the Commission is initiating an investigation of the Xerox Corporation to determine whether there is reasonable basis upon which to conclude that the Act has been violated. Accompanying this letter is a request for information which we believe is necessary to our investigation. Please return this information within twenty-one days of your receipt of this letter.

When the Commission has analyzed the requested data, we may wish to schedule one or more tours of selected facilities. As part of our investigation we may interview current and former employees. Upon completion of the analysis and interviewing phases, a conference between the Commission and Xerox may be useful. Every effort will be made to minimize any inconvenience to the orderly operation of your business.

Should you have any questions regarding this request or wish to discuss the procedures to be followed in this investigation, please contact Carlton L. Preston, of this office, at 202-634-6275.

Sincerely,

James N. Finney
Director, Systemic Programs
Associate General Counsel

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Douglas M. Reid, V.P.
Xerox Corp.
800 Long Ridge Rd. Stamford, Conn. 06904

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RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO Douglas M. Reid				
STREET AND NO. Xerox CP 800 Long Ridge Rd				
P.O., STATE AND ZIP CODE Stamford Conn.				
POSTAGE				$
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE			¢
	OPTIONAL SERVICES	SPECIAL DELIVERY		¢
		RESTRICTED DELIVERY		¢
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
			SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES				$
POSTMARK OR DATE				

PS Form 3800, Apr. 1976

No. 213181
RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED—
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		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
			SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES				$
POSTMARK OR DATE				

PS Form 3800, Apr. 1976

REQUEST FOR INFORMATION

Please return this information within twenty-one days of your receipt of this letter to:

Carlton L. Preston
Senior Trial Attorney
Equal Employment Opportunity
Commission
Room 450
2401 E Street, N. W.
Washington, D. C. 20507

Should you have any questions as to the form or extent of information requested, please call Mr. Preston at 202 634-6275.

Definitions

1. Xerox Corporation and its subsidiaries includes, but is not limited to, all subdivisions of:
    - A. Reprographic Business Group
        - Finance and Planning Office
        - Personnel
        - Reprographic Products
        - Multinational Service and Technical Support
        - Supplies and Materials
        - Low Volume SBU
        - Mid Volume SBU
        - Centralized SBU
        - Advanced Products and Technology
        - Electronics Division
        - Reprographic Manufacturing
        - Electro-Optical Systems
    - B. Operations
        - Business Systems Group
        - International Operations
        - Rank Xerox Limited
        - Xerox Publishing Group
        - Fuji Xerox Co. Ltd.
        - Operations
        - Operations Support
    - C. Information Products Group
        - Operations and Control
        - Strategic Planning
        - Personnel

Information Systems
Advanced Product Development
Xerox Peripheral Systems
Versatec
WUI, Inc.
Office Products Division
Kurzweil Computer Products
Xerox Computer Services

and any other subdivisions not listed above

2. Transfer refers to a lateral move by an employee to a position which does not have a significantly greater or less authority, responsibility or salary than the one he left. Within this request, transfers include moves among any Xerox divisions, facilities or subsidiaries.

3. Promotion refers to a move by an employee to a position which is greater in authority, responsibility or salary than the one he left. Promotions, within this request, include moves among any Xerox divisions, facilities or subsidiaries.

4. Termination refers to the severance of the employment relationship between the Xerox Corporation and its employee for any reason. Such reasons include, but are not limited to, firing because of reduction in force, voluntary or involuntary retirement, or resignation by the employee.

5. Hire refers to the initiation of an employment relationship [illegible] full time or part time, between the Xerox Corporation and a new employee. This term does not describe the situation in which [illegible] employee of one Xerox division, group or subsidiary leaves to become employed by another.

6. Computerized file refers to a collection of electronically retrievable data stored on tape.

7. Document refers to any writing or recording, consisting of letters, words or symbols set down by handwriting, typewriting, printing, xerography, photostating, electronic impulses, etc.

Please provide, for the period from January 1, 1980 through December 31, 1983, the following information:

1. A computerized file containing, for each salaried employee terminated voluntarily or involuntarily by the Xerox Corporation and its subsidiaries, a record listing:
a. name, employee number, social security number
b. date of birth
c. date of termination
d. reason for termination
e. position, department, division, group, facility to which assigned at termination
f. specific benefits continued or paid upon termination or to be paid in the future
g. salary at termination;

2. A computerized file containing, for each person hired into a salaried position by the Xerox Corporation and its subsidiaries a record listing:
a. name, employee number, social security number
b. date of birth
c. position, department, division, group and facility to which assigned at hire
d. date of hire
e. salary at hire
f. date and reason for termination for those no longer employed by the Xerox Corporation and/or its subsidiaries;

3. A computerized file containing, for each salaried employee transferred from one position to another, a record listing:
a. name, employee number, social security number
b. date of birth
c. position, department, division, group and facility to which assigned before and after transfer
d. date of transfer
e. whether transfer was at employee's or company's request
f. whether transfer was in lieu of termination
g. whether prior position was eliminated
h. if employee is no longer employed by Xerox or its subsidiaries, date of and reason for termination;

4. A computerized file containing, for each employee promoted to a salaried position in all facilities of Xerox Corporation and its subsidiaries, a record listing:
a. name, employee number, social security number
b. date of birth

c. date(s) of promotion
d. position, department, division and facility before and after promotion
e. salary before and after promotion
f. whether prior position was eliminated
g. whether person promoted replaced an employee who was terminated

5. A computerized file listing all salaried positions which were eliminated by Xerox Corporation and its subsidiaries by position title, department, division, group, facility, and date of elimination.

For requests 1 through 5, computerized files covering the time period from January 1, 1980 through December 31, 1983 have been sought. Xerox may, for its convenience, combine the responses to these requests into one computerized file. For each computerized file submitted, please provide its format, layout, coding and any other materials necessary to the interpretation of the data.

6. Please provide a computerized file listing all salaried positions which exist in the Xerox Corporation and its subsidiaries, as of December 31, 1983, by position title, department, division and facility.

7. Please provide, as of December 31, 1983, a computerized file listing all salaried employees of Xerox Corporation and its subsidiaries, including, for each employee, a record listing:
a. name, employee number, social security number,
b. date of birth,
c. date of hire by Xerox Corporation and/or its subsidiaries,
d. current position, department, division, group and facility,
e. current salary, and
f. date of assignment to the current position, department, division, group and facility.

8. Please provide copies of all personnel manuals in use for all salaried employees of the Xerox Corporation and its subsidiaries between January 1, 1980 and December 31, 1983.

9. Describe the specific criteria, by position, used to select salaried employees for termination, including early retirement, in all reductions in force in each facility and division of Xerox Corporation and/or its subsidiaries between January 1, 1980 and December 31, 1983.

10. Please submit copies of all documents describing criteria for termination in force during the period from January 1, 1980 through December 31, 1983, along with a list of all company personnel to whom such documents were circulated.

11. Describe the specific procedures followed in all reductions in force for salaried positions in all facilities of Xerox Corporation and its subsidiaries from January 1, 1980 to December 31, 1983.

Include:

a. names and positions of persons who made initial decisions,

b. names and positions of persons responsible for reviewing initial decisions and implementing reductions in force,

c. any appeal procedure(s) available to employees selected for termination,

d. copies of documents which employees who accepted early retirement were required to sign,

e. copies of all documents issued to salaried employees regarding the reductions in force, and

f. copies of all documents issued to salaried employees selected for termination, or who chose early retirement, regarding benefits available, procedures for appeal of the termination, opportunities for re-training or transfer.

12. Describe, for each salaried position in Xerox Corporation and its subsidiaries, as of December 31, 1983, the procedures for promotion and the criteria upon which candidates are chosen.

13. Describe the hiring process, for the period from January 1, 1980 to December 31, 1983, for each salaried position in the Xerox Corporation and its subsidiaries, including:

a. copies of the initial application forms for each position,

b. a list of each item of data sought from or created by Xerox for applicants,

c. identification of the persons, by position, within each division, group, or facility responsible for making hiring decisions,

d. a description of any interviewing procedures,

e. the criteria upon which applicants are chosen for each salaried position,

f. a description of any rating system used to categorize applicants as to qualifications, skills, experience, and

g. copies of any rating formats used.

14. Provide a list of all advertisements or announcements seeking applicants for employment by Xerox Corporation and its subsidiaries during the period from January 1, 1980 to December 31, 1983. For each, include the position(s) department, division, facility for which applicants were sought, the name of the newspaper, employment agency or other media which solicited applicants, and the date(s) of each advertisement or announcement.

15. Provide copies of the complete personnel files maintained by Xerox Corporation or its subsidiaries for the following persons who have filed charges of age discrimination:

Edward Zawadski
Anthony Salvatore
Donald Miller
Martin Cocca
Michael Sylvestri
John Cook, Jr.
Carl Heisler
Robert Patterson
Edward Fedoris
Arthur Brickman
Harry Moore
C.B. Stege
Richard Monacell
Benjamin Borrelli
Ronald Sellers
Carlton Baxter
William Karlsen
Lindy VanKouwenberg
Walter Pidek
Harold Wahl
Dalton McCloskey
John Till
William Brant
Dov Weidenfeld
George Klee
Caroline Fox
Elinor Voellinger
John Bennet
Richard Van Maaren
Joseph Festa
Robert Shrader
Frank Lucas
Donald Devito
John Blackwell
Janet Lenz
John Stone
Alvah Dillenbeck
Daniel Klymshin
Tony Duncan
Mahandra Garg
Geoffrey Price
George Miller
William Benton
Gene Novotine
Louise Dockey
Ruth Cartler
David Goldberg
James O'Sullivan
Raymond Loyer
Jane Cohant
John Stalder
Diann Wolfe
Jasper Brady
Arthur Livecchi
Robert Case
Martin O'Malley

16. Describe efforts to retrain employees who were selected for termination between January 1, 1980 and December 31, 1983. Include descriptions of efforts for individuals and of programs used by any subdivision of the Xerox Corporation.

17. List the title and address of the major administrative office for each division, group or subsidiary, within the United States, in which is conducted separate decision making personnel functions, such as hiring, record keeping and termination decisions

18. List the name, title and address of each Xerox official who ha or has had final authority for decisions as to terminations for each division, group or subsidiary of Xerox during the period from January 1, 1980 to December 31, 1983.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

February 22,1984

MEMORANDUM

TO: District and Area Directors

THRU: Odessa Shannon, Director
Office of Program Operations

FROM: James N. Finney, Director
Systemic Programs

SUBJECT: Age Charges Against Xerox Corporation

Because the Commission has initiated a nationwide investigation of the policies and practices of the Xerox Corporation with respect to possible age discrimination, we request that your office undertake the following action on all age charges naming the Xerox Corporation or its subsidiaries* as respondent:

1. Collect all open age charges and mail copies to Systemic Programs.
2. Stay any further settlement, conciliation, issuance of conciliation failure letters or other administrative closure for any of these charges, pending clearance from Systemic Programs. Investigation may continue but should be coordinated with that conducted by Systemic Programs.
3. Notify Systemic Programs immediately of any new charges filed against Xerox or its subsidiaries by mailing copies of such charges to Systemic Programs.

Copies of charges, questions, requests for clearance and notifications of new charges should be directed to:

Judith L. Mathis
Systemic Programs, LEC
EEOC
2401 E Street, N. W. Room 444
Washington, D. C. 20507
Telephone: FTS 634-6904

Our need for information on pending charges is urgent, particularly with regard to age discrimination charges of termination or involuntary retirement of salaried employees. Copies of all charges should be sent to Systemic Programs within 10 days of receipt of this memorandum. Your assistance in providing this information as soon as possible will be greatly appreciated.

Thank you for your cooperation.

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* Subsidiaries of Xerox Corporation include Ginn Company, Versatec, and WIU, Inc.

cc: Region Directors

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

April 13, 1984

MEMORANDUM

TO : James N. Finney
Director
Systemic Programs

THRU : Leroy T. Jenkins, Jr.,
Director, LEC

FROM : Carlton L. Preston
Senior Trial Attorney

SUBJECT: Xerox Investigation/Possible Suit

I. SCOPE OF INVESTIGATION OR POSSIBLE SUIT

A. Issues

1. Termination

Charges, complaints, and interviews indicate that termination of salaried employees company-wide is the strongest issue involved in a possible lawsuit against Xerox. This issue would include what Xerox as labels voluntary and involuntary termination and retirement.

2. Hiring

Our evidence indicates that Xerox has hired many people over the past 4 years, almost none of whom have been over 40 at hire. We have no active charges alleging failure to hire on the basis of age and the private lawsuit has so far not included applicants. We prefer not to deal with hiring beyond pointing out that during the period of reductions in force Xerox was hiring new employees and that these new employees were usually just out of college.

3. Promotions/Transfers

We have no active charges alleging failure to promote or transfer. We plan to do some preliminary analysis in these areas to determine whether there appears to be any evidence which would warrant a more in-depth analysis. There are indications that younger employees were transferred in lieu of termination, while this alternative was unavailable to people over 40.

4. Wages

We have no evidence or charges alleging wage discrimination.

B. Employees Included

1. Xerox has, including subsidiaries, about 54,000 salaried employees. If we only look at terminations, the potential class numbers between 5000 and 6000 people. About 1000 former employees have so far opted into the Lusardi class.

2. Positions of Salaried Employees

Most are sales representatives or professionals such as engineers, accountants, personnel administrators, financial analysts and marketing people. Some secretarial and clerk positions are included in the salaried category, but not much is known about them as potential class members.

C. Geographic

Potential plaintiffs are and were employed nationwide. Xerox has about 265 facilities and employees at most of these facilities appear to be implicated. Most terminees are concentrated in the northeast in New York, Massachusetts, Connecticut and New Jersey. Xerox headquarters is located in Stamford, Connecticut and has a centralized, computerized personnel data system. We will concentrate our investigation at the headquarters. In litigation we will need to travel to Dallas, the West Coast, and to the Northeast for depositions and witness interviews.

II. PROOF

A. Documentary-Preliminary

1. Though Xerox has said the massive terminations were required to reduce the number of employees, from May, 1980 to March, 1983 Xerox hired more people than were terminated. 14,594 salaried employees were terminated, while 16,325 were hired. Ads have appeared in the New York Times and other major papers just about every Sunday seeking to hire people for the very jobs from which charging parties/ plaintiffs were RIF'd.

2. In Reprographic Manufacturing, an engineering center in Rochester, N.Y., 677 professionals were terminated during this period, of whom 415 (61.3%) were 40 or over. There were at least 48 new college hires during 1983 who replaced RIF'd older workers.

3. Office Products Division

The original named plaintiffs in Lusardi worked in this division. Of the 291 sales reps and professionals terminated during the period above, 206 (70.7%) were over 40 at termination. (See B below as to hires in this division)

4. When the original named plaintiffs in Lusardi were fired, the company said they were selected because their sales were low. They all had histories of high sales and had good performance reviews until the one just prior to termination. Younger sales reps who ranked lower than plaintiffs were not RIF'd. Only 6 of 60 account reps whose sales were lower than Lusardi's were RIF'd. At least 3 of these were over 40. The age of the other 3 is unknown.

5. A computer tape given us recently by Xerox shows that 65.9% of their salaried workers are below 40. A printout (see attachment) also shows a sharp drop in the number and percentage of employees aged from 44 to 50. These numbers and percentages are low compared to the normal workforce.

6. We have 64 charges shown as active in our records -- some of these charging parties have undoubtedly become plaintiffs by now. A few of these are now with 706 agencies. 32 of the active charges are in our Buffalo office. All active charges allege, at minimum, terminations on the basis of age. Xerox seems to have stopped submitting information requested to investigate these charges.

7. Private plaintiffs' lawyers have a memo which was circulated at HQ which announced a strategy of getting rid of "senior professionals" to save money.

B. Testimonial

1. A former VP of Business Systems, who also served Xerox as chief financial planner, will testify that the practice of division managers was to cut costs by getting rid of higher paid and therefore older employees. He states that Xerox management often does other than what they announce they're doing, and he has concluded there was no real reduction in force. He was fired in January 1980 which makes his claim untimely. He's willing to testify and assist us in analyzing data regarding corporate policies and practices.

2. The former Human Resources Manager for the Office Products Division will testify that in early 1982 he hired as many people just out of college to be sales representatives as were terminated in Nov. 1981. (That was the time large numbers, including the named plaintiffs, were RIF'd). He was terminated in 1982 and was not permitted to transfer to another job he found with a subsidiary. He will testify that the files of the workers RIF'd in November 1981 came to OPD headquarters without proper documentation as to how they were selected for RIF. Most of those RIF'd without any of the proper procedures completed he says were over 40. When he consulted an attorney in HQ GC office, the attorney agreed they were in trouble with potential ADEA violations. This former manager has several stories about meetings in which top managers told underlings to get rid of the "old guys." He states that young OPD employees were given transfers to other divisions in lieu of termination. That option was unavailable to those over 40. To select employees for termination, a matrix including 'potential' was used. Potential was interpreted to mean possible years of high achievement and promotions left, so that Xerox managers found new college graduates to have the most potential.

3. Many people can testify as to their individual situations; typically that they had a long history of high performance, several promotions, and a drop in performance rating followed by a sudden notice of termination. They almost always were immediately replaced and have knowledge that their job was not eliminated.

4. Most potential plaintiffs made between $40,000 and $85,000 a year. Many will testify that in most cases their retirement benefits, potential or those they are receiving, have been reduced by 1/2 to 2/3 because they were forced to retire early or were terminated. Some have medical problems which has made getting another job more difficult and has made their loss of health insurance benefits particularly important.

5. Private plaintiffs have requested a jury trial. It appears we have many potential witnesses who are sympathetic, knowledgeable and articulate.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

April 16, 1984

MEMORANDUM

TO : James N. Finney
Director
Systemic Programs

THRU : Leroy T. Jenkins, Jr.,
Director, LEC

THRU : Estelle D. Franklin
Supervisory Trial Attorney

FROM : Carlton L. Preston
Senior Trial Attorney

SUBJECT: Xerox Investigation/Request for Issuance of Letter of Violation

We request that you issue the attached Letter of Violation to the Xerox Corporation. Evidence gathered thus far, outlined below, indicates that a Letter of Violation is appropriate at this time. Because the time limit of the ADEA is tolled only by filing suit or by the Letter of Violation, this issuance should be completed quickly.

I. SCOPE OF INVESTIGATION OR POSSIBLE SUIT

A. Issues

1. Termination

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Most salaried positions are sales representatives or professionals such as engineers, accountants, personnel administrators, financial analysts and marketing people. Some secretarial and clerk positions are included in the salaried category, but not much is known about them as potential class members.

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6. We have 64 charges shown as active in our records -- some of these charging parties have undoubtedly become plaintiffs by now. A few of these are now with 706 agencies.

Thirty-two of the active charges are in our Buffalo office. All active charges allege, at minimum, terminations on the basis of age. Xerox seems to have stopped submitting information requested to investigate these charges.

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5. Private plaintiffs have requested a jury trial. It appears we have many potential witnesses who are sympathetic, knowledgeable and articulate.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Letter of Violation

I issue, on behalf of the Commission, the following findings as to the compliance of Xerox Corporation with the Age Discrimination in Employment Act (ADEA), as amended.

The Commission has determined that the Xerox Corporation has discriminated against individuals named, and yet to be named, in violation of Section 4(a) of the ADEA by following employment policies and practices which discriminate against salaried employees and former employees within the protected age group from 40 to 70. These policies and practices include, but are not limited to, selection of employees for termination on the basis of age.

Section 7(b) of the Act requires that before instituting any action the Commission shall attempt to eliminate the discriminatory practices alleged and to effect voluntary compliance with the requirements of the Act through informal methods of conciliation, conference, and persuasion. Section 7(e)(2) of the Act provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with §7(b). The period during which the statute of limitations is tolled, as provided in §7(e)(2), begins upon issuance of this letter.

It is the policy of the Commission to notify the persons aggrieved by the violations which are the subject of this determination of their independent right of action under the ADEA. However, we plan to withhold such action for at least 10 days in order to provide you with an opportunity to discuss this matter further. Carlton Preston, a member of my staff with whom you have already met, will be contacting you shortly to arrange a meeting to begin conciliation.

On behalf of the Commission,

James N Finney
James N. Finney
Associate General Counsel

Date 4/19/86

C. Preston

Xerox Corporation
P.O. Box 1600
Stamford, Connecticut 06904
203-329-8700

Office of General Counsel

XEROX

April 30, 1984

James N. Finney, Esq.
Associate General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Re: EEOC Investigation

Dear Mr. Finney:

I am writing to reply to your letter of April 19th (copies of which Xerox received here on April 26th and April 30th) and to express my understanding of the salient points of our telephone conversation on April 26th.

There have been no hearings held or findings or determinations made formally by the Commission itself. Rather, you issued the letter of April 19th on the basis of a memorandum by one of your staff members and pursuant to a delegation of authority to certain officials in the EEOC, at their discretion, to issue form letters from the EEOC's Compliance Manual.

We consider the EEOC's action to be capricious. The letter was issued before the EEOC could have analyzed all the information it had originally requested from Xerox and without giving Xerox the opportunity to respond to any of the allegations or circumstances giving rise to the purported findings of violation. We understand the true purpose of the letter is to toll the statute of limitations contained in the ADEA and to invite resolution of the claims through informal methods of conciliation.

Xerox denies it has violated the ADEA, but as I stated to you, it is willing to meet promptly with the EEOC to conciliate and resolve the issues. We understand that, at our meeting, the EEOC will be prepared to discuss the factual bases for its purported findings, as well as specific suggestions for remedying the claims of identified, aggrieved individuals. We suggest that the conciliation process begin as soon as possible. We are ready to meet now.

We look forward to hearing from your staff promptly.

Very truly yours,

Philip E. Smith

Philip E. Smith
Associate General Counsel

PES:bak

5 3 84

#507

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

May 11, 1984

To: Xerox file

From: Judy Mathis

Subject: Summary of Hearing May 2, 1984, Lusardi v. Xerox from transcript rec'd 5/10/84

Bob Jaffe and his associate, Max Manshel, appeared for plaintiffs. For Xerox, Lawyers from their New York and New Jersey firms, their General Counsel, Banks, Associate GC Smith, Assoc GC Paul, Sr. Litigation Counsel, Sandy Hodinott appeared, along with 4 other corporate officers.

Xerox asked to meet with Judge Stern to inform him that the EEOC Letter of Violation had been received and to ask his permission to keep its contents secret until after the May 9th deadline for plaintiffs to opt into the private suit. On advice of their SEC counsel they believed they had to reveal the LOV to the SEC; however, they wanted to reveal only that they had received such a letter, along with their explanation of what it means. They sought the Court's agreement to keep the letter from being released to current and potential class members. Xerox wanted the plaintiffs' lawyers to be prevented from advising clients and potential clients about the LOV. The Xerox position regarding the LOV is that it is misleading because, they told the Judge, there really has been no change in the EEOC's position and the fact that the Commission is investigating has already been revealed.

Judge Stern's major concern is the possible effect any conciliation between the EEOC and Xerox will have on the Lusardi suit, and whether EEOC, should it file suit, would represent plaintiffs in the Lusardi action. He specifically asked counsel several times whether EEOC will be conciliating on behalf of anyone who has opted into the lawsuit. He expressed the concern that the Commission may be conciliating on behalf of, or in some way cutting off rights of people, who don't even know the conciliation which concerns them is taking place. Additionally, Judge Stern questioned counsel closely on the effect of the tolling of the statute of limitations, brought about by the LOV, on the lawsuit and on the rights of potential plaintiffs.

The Judge decided that knowledge of the LOV is important to those weighing the decision to opt into the lawsuit. He directed Xerox to give Jaffe a copy of the letter and strongly implied to Jaffe that it is his duty to see that plaintiffs and potential plaintiffs have this information. He affirmed that he cannot interject himself between plaintiffs' lawyers and their clients. He told Xerox they can say whatever they want about the letter except that they "will pay" if they make misleading statements.

Xerox counsel Freund and Smith sometimes misled and, in a few instances, gave inaccurate information to the Court. They described the LOV as a form letter only issued to toll the statute of limitations. They stated that "EEOC counsel" confirmed that no findings have been made by the Commission and that the "letter is merely based on a memorandum from a staff attorney." In addition, they made the point more than once that the Commission has only just begun its investigation, since the data submitted by Xerox was given to EEOC "only a day or two" before the LOV was issued, so the "EEOC could not possibly have analyzed the material."

Smith took the position that EEOC cannot represent any of the poeple who have opted into the lawsuit, on the theory that the Commission must conciliate before litigating and these people have begun litigating. He told the Judge that he had no notice of the LOV before he got it in the mail. Freund asserted that the LOV only tolls the statute of limitations for any lawsuit the EEOC might file; it is not tolled for individuals who might want to sue. Freund and Smith implied that the LOV and conciliation secret secret because the EEOC wants it that way.

About the conciliation, Freund strongly implied that any agreement would include a settlement of the lawsuit and finally guaranteed to the Judge that Xerox would not conciliate as to the plaintiffs in the lawsuit without representation by plaintiffs' attorneys.

UNITED STATES GOVERNMENT
# memorandum

DATE: June 4, 1984

REPLY TO ATTN OF: Robert L. Williams
Regional Attorney

SUBJECT: Presentation Memorandum
John Mitro v. Natick School Committee and
Education Association of Natick
Charge No. 011-82-0822

TO: Michael A. Middleton
Associate General Counsel

Enclosed please find the Presentation Memorandum and Draft complaint recommending litigation of the above referenced charge.

Enclosures

RLW/grc

PRESENTATION MEMORANDUM

I. Introductory Information

1. Statute Involved: ADEA.

2. Parties

   a. Respondents: Natick School Committee and Education Association of Natick

   b. Defendants: Same

   c. Charging Party: John Mitro

3. Brief Summary of Nature and Scope of Proposed Suit:

   The issue in this case is whether respondents have violated ADEA § 4(a), (c) and (e) by agreeing to a voluntary retirement incentive plan which is restricted to teachers 55-61 years of age, which pays a ten percent salary increase to teachers in that age bracket who give advance notice of early retirement, and which excludes from eligibility for participation teachers who have attained the age of 62 or more. The suit will be on behalf of the Charging Party and other teachers ineligible because of age.

4. Case Numbers and Charge Numbers:

   011-82-0822: Mitro v. Natick School Committee

   011-82-1041: Mitro v. Education Association of Natick

5. Location of facilities: Natick, Mass.

6. Size of Work Force: over 20: precise number unknown

7. SIC Code:

8. Nature of Respondents' Business: Public schools; teachers' union

II. Administrative Record Narrative/Jurisdiction

1. Summary Case Processing Chronology

   a. Date Charge Filed: January 25, 1982

   b. Referral History: referred to Massachusetts Commission against Discrimination on February 8, 1982

   c. Date of Letter of Violation: February 23, 1984

   d. Date of Notification of Conciliation Failure: April 2, 1984

   e. ADEA Findings: Violation of ADEA § 4(a)(1) by excluding John Mitro (and other individuals to be named) from eligibility because of their having attained the age of 62 or more.

   f. Jurisdiction: The retirement incentive program became effective September 1, 1978. The Charging Party became too old to be eligible when he attained the age of 62 on November 18, 1979. He retired on March 1, 1983. He claims that in September 1981 he gave advance notice of intention to retire as of June 1982. His charge under ADEA, alleging that intention, was served on the school committee in May 1982. The discriminatory terms of the retirement incentive program affected his pay until the actual date of his retirement. Because the discrimination is willful, the limitations period is three years. A complaint can be filed at least up to September 1, 1984 plus 37 days thereafter because of the tolling effect of efforts to conciliate.

2. Comparative Scope of Decision/Determination and Suit

   a. Charge

      Basis - Age discrimination

      Issue - Permissibility under ADEA § 4(a) of retirement incentive plan excluding as ineligible teachers over 61 years of age.

      Facilities - all

   b. Unalleged but decided: N/A

c. **Proposed Suit**

Basis - same

Issues- complaint can also allege a violation of ADEA § 4(c) and (e).

Facilities - same

d. **Additional Issues** - Conciliation efforts were fruitless. The issues under § 4(c)and (e) are closely related to the issue under § 4(a).

e. **Poster Failure**: N/A

III. Other Related Action

1. Contract Compliance Check: N/A

Affirmative Action Plans: N/A

2. Other Suits Against Respondents: None raising issues have presented.

3. Pending Charges: None

IV. Proof

1. Factual and Legal Analysis

The theory of the case is differential treatment based on age. The retirement incentive plan is restricted to teachers 55-61 years of age; it explicitly excludes from eligibility for participation teachers who have attained the age of 62 or more. A teacher 62 or over who elects early retirement and gives advance notice will not receive the ten percent pay increase offered under the plan.

a. **Proof by EEOC**.

The terms of the plan itself, embodied in the collective bargaining agreement between respondent school committee and respondent union, afford direct proof of discrimination based on age.

b. **Defenses**. Respondents will argue:

(1) **Waiver**.

The Charging Party was one of several teachers urging adoption by respondents of a retirement incentive program.

He could have opted to take part in the program in 1978, but he chose not to.

Although he did not receive the program's 10% salary bonus, by postponing retirement until he had became 65 he received higher pension payments than he would have received under the program, and therefore cannot claim economic disadvantage.

(2) **Economics**

Teachers 62 or over do not need a salary bonus to induce early retirement.

(3) **Voluntary Nature of Program**

The program is optional and therefore does not discriminate.

(4) ADEA § 4(f)(2)

The program is exempt from the ADEA as a bona fide employee benefit plan

c. Rebuttal. These defenses can be rebutted:

(1) Waiver.

The Charging Party urged adoption of retirement incentives but did not recommend age-specific limits on eligibility or benefits.

The fact that he did not elect early retirement under the program in 1978, when he was eligible, does not bar his recourse to the ADEA in 1982.

The concept of waiver under the FLSA and the ADEA is narrowly limited. An employee who accepts substandard wages pursuant to a contract or release can nevertheless sue for amounts owing under the statute. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945).

As an individual barred from the program because of his age, he can claim the 10% salary bonus for the period following notification of his intention to retire.

(2) Economics

Even assuming the correctness of respondent school committee's claim that teachers 62 or over do not need a retirement incentive, the specification of age in connection with a salary bonus is itself actionable under ADEA § 4(e). In fact, some teachers planning to continue teaching till 70 may need an inducement to retire sooner, even if they are over 65.

(3) Voluntary Nature of Program

The fact that the plan was voluntary ought not to shield respondents from the ADEA. Voluntary or not, it necessarily affected the career planning of every teacher 55 or over, and thus constituted a term, condition or privilege of employment as to which respondents are forbidden to discriminate on the basis of age. See *Arizona Governing Committee* v. *Norris*, 51 U.S. L.W. 5243, 5245 n.10 (U.S. 1983) (voluntary deferred compensation offering lower benefits to women than to men *held* to violate Title VII). Furthermore, apart from conciliation or settlement, a worker's voluntary relinquishment of wage payments under the FLSA does not bar the worker's subsequent action to obtain those payments. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). It follows under ADEA § 7(b) that voluntary acceptance or relinquishment of salary increases paid under a discriminatory age-specific retirement incentive plan would not bar a subsequent action under the ADEA.

(4) ADEA § 4(f)(2).

The defense under ADEA § 4(f)(2) is not available to respondents. Their retirement incentive plan is not an employee benefit plan within the meaning of that provision, because age is not an actuarially significant factor in the plan's cost. See 44 Fed. Reg. 30648, 30649-50 (1979); 29 C.F.R. § 860.120. Respondents would not be able to show that including older teachers in the plan on the same basis as the teachers 55-61 would cost more because of the older teachers' age. Instead, the cost of the plan is determined by the dollar value of the salary increases offered under the plan, and the dollar value of those increases is determined by salary level, not by age. Conceivably, moreover, some of the older teachers would opt for early retirement sooner than would some of the teachers 55-61; to that extent the school committee would actually pay less on account of the older teachers than on account of the younger.

Case Law

As yet, no decision has come down under the ADEA which addresses age-limits in retirement incentive programs. The case most nearly in point is EEOC v. Borden's, Inc., 33 E.P.D. ¶ 34,140 (9th Cir. 1984), which invalidates, under the ADEA, a policy denying severance pay to workers slated for reduction in force who are eligible to retire.

Special Proof Requirements

The age-specific terms of the program itself are the most direct proof of the respondents' discrimination. As to liability, the case may be amenable to summary disposition.

Proof of the date the Charging Party notified respondent school committee of intention to retire may involve his testimony. On the present state of the record, there seems no reason to regard his testimony as less credible than that of other witnesses. But even if he is contradicted, his charge, filed in January 1982, contains an allegation effectively notifying respondents of intention to retire.

Willfulness Under ADEA

The age limits in the retirement incentive program are the product of collective bargaining, and therefore were adopted knowingly and intentionally.

EEOC Profile, SMSA, Statistical Data. N/A

V. Laches

No problem with laches is anticipated. The period between filing of the charge and submission for litigation is less than 36 months. The period between conciliation failure and submission for litigation is less than 9 months. Although more than 24 months have elapsed since the charge was filed, neither respondent has claimed prejudice. The charge was mailed to respondent school committee on May 18, 1982.

VI. Impact Section

1. Back Pay and other relief

Approximately $1300 for Charging Party, plus interest, plus $1300 liquidated damages.

For others similarly situated, to be calculated.

2. Cost of Litigation

Probably minimal, because the case lends itself to summary disposition.

3. Other factors in recommending litigation

This sort of retirement incentive plan, with age-limits excluding workers 62 ~~or~~ over, is apparently common in Massachusetts. The case would have precedential value and should not be particularly difficult to win.

VII. Jury Trial Demand

A jury is demanded, but the case appears suitable for summary judgement.

VIII. Conclusion and Recommendation

This case presents a question of law which warrants litigation and resolution. On that basis, we recommend that the litigation of this case be approved.

Dated: New York, New York
May , 1984

ROBERT L. WILLIAMS
Regional Attorney

Ann Thacher Anderson
ANN THACHER ANDERSON
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007
(212) 264-7188

DRAFT FOR REVIEW ONLY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	Civil Action No.
v.	
THE SCHOOL COMMITTEE OF THE TOWN OF NATICK, MASSACHUSETTS and THE EDUCATION ASSOCIATION OF NATICK, Defendants,	COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343 and 1345. This is an action authorized and instituted pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 et seq. (hereinafter the "ADEA"), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act
✓ of 1938 (hereinafter the FLSA), as amended, 29 U.S.C. §§ 216(c), 217.

2. The discriminatory practices alleged below were and are now being committed within the State of Massachusetts.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter "the EEOC"), is an agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as
✓ amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

✓ 4. At all time mentioned herein, Defendant, School Committee of the Town of Natick, Massachusetts, (hereinafter
✓ "Defendant Committee"), has continuously been and is now an agency or instrumentality of the Town of Natick, Massachusetts, which is a political subdivision of the State of Massachusetts. The

NOTE MODIFICATIONS — PARAGRAPHS 1,3,4,5,7,10,13, AND A-F.

[N.B.: 20-employee NOT NECESSARY FOR EMPLOYER COVERAGE UNDER ADEA § 11(b)]

committee has power to hire and employ, G. L. Mass. ch. 71 § 38; ~~has at all times mentioned herein employed and now employs more than twenty employees,~~ and is an "employer" within the meaning of ADEA § 11(b), 29 U.S.C. § 630(b).

5. At all times mentioned herein, Defendant, Education Association of Natick (hereinafter "Defendant Union"), has continuously been a labor organization within the meaning of ~~subsections (d) and (e) of~~ ADEA § 11(d) and (e), 29 U.S.C. § 630(d) and (e).

STATEMENT OF CLAIMS AND ALLEGATIONS

6. Before instituting this action, representatives of the EEOC attempted to eliminate the discriminatory practices hereinafter alleged and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion, in accordance with ADEA § 7(b), 29 U.S.C. § 626(b).

7. Effective September 1, 1978 and thereafter, Defendants negotiated and agreed upon a collective bargaining agreement, which as subsequently amended, provided for a retirement incentive plan incorporating the following terms and conditions (see Exhibits A and B, attached hereto and made a part hereof):

"ARTICLE XVI- EARLY RETIREMENT INCENTIVE

> "In order to provide an incentive for early retirement for those who so desire, and in order to preserve job opportunities for younger teachers who would otherwise now face a reduction in force, the parties have negotiated this article.
>
> "A) A teacher who is retiring from the Natick school system and is retiring at age 55, 56, 57, 58, 59, 60 or 61 shall be eligible for salary increases as follows:
>
> "1. A teacher who gives written notice to the Superintendent of his/ her retirement three (3) school years in advance of the effective date of his/her retirement shall be paid at 1.10 of the salary position that the teachers' salary schedule indicated he/she would earn for each of the three years preceding the effective date of his/her retirement.
>
> "2. A teacher who gives written notice of his/her retirement two years in advance in accordance with the prior Section shall be paid at 1.10 for the two years preceding retirement; and a teacher who gives written notice one year preceding retirement shall receive the 1.10 salary for the last year preceding retirement.
>
> "3. The notice under the above Section must be given by December 1 preceding...

> the first school year in which the raise is effective.
>
> "B) ...This Article applies only to those teachers who retire no later than June 30 following their 55, 56, 57, 58, 59, 60 and 61st birthday, or for 12-month administrators who retire no later than August 31, following their 55, 56, 57, 58, 59, 60 and 61st birthday. The notice of retirement is final and teachers electing this provision must be retired from the Natick shcool system effective on the date indicated." ~~See Exhibits A and B~~.

✓

8. By agreeing to the terms and conditions of the retirement incentive plan quoted above, and by putting them into effect, Defendant Committee has willfully discriminated against employees over 61 years of age with respect to their compensation, terms, conditions or privileges of employment, including, without limitation, one John Mitro, the Charging Party herein, in that Defendant Committee excluded such employees, because of their age, from eligibility to receive the salary increase provided for participants in Defendants' retirement incentive plan, and has thus willfully violated ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1).

10. By agreeing to the terms and conditions of the retirement incentive plan quoted above, and by putting them into effect, Defendant Committee has willfully limited, segregated or classified its employees in a way adversely affecting the employment status of employees over 61 years of age, because of their age, including, without limitation, John Mitro, the Charging Party herein, and has thus willfully violated ADEA § 4(a)(2), 29 U.S.C. § 623(a)(2).

10. By agreeing to the terms and conditions of the retirement incentive plan quoted above, and by putting them into effect, Defendant Union has willfully discriminated against employees of Defendant Committee over 61 years of age, because of their age, including, without limitation, John Mitro, the Charging Party herein, and has thus willfully violated ADEA § 4(c)(1) and (3), 29 U.S.C. § 623(c)(1) and (3). ✓✓

11. By agreeing to the terms and conditions of the retirement incentive plan quoted above, and by putting them into effect, Defendant Union has willfully limited, segregated or classified employees of Defendant Committee in a way adversely affecting the employment status of employees over 61 years of age, because of their age, including, without limitation, John Mitro, the Charging Party herein, and has thus willfully violated ADEA § 4(c)(2), 29 U.S.C. § 623(c)(2).

12. By agreeing to the terms and conditions of the retirement incentive plan quoted above, and by putting them into effect, Defendants have willfully printed or published, or caused to be printed or published a notice relating to employment by Defendant Committee indicating a preference, limitation, specification or discrimination based on age, and have thus willfully violated ADEA § 4(e), 29 U.S.C. § 623(e).

13. A judgment restraining violations of the ADEA and requiring payment of amounts owing to persons as a result of a violation of the ADEA is specifically authorized by ADEA § 7(b), 29 U.S.C. § 626(b), ~~see~~ which incorporates by reference FLSA §17, 29 U.S.C. § 217.

PRAYER FOR RELIEF

WHEREFORE EEOC respectfully prays that this Court:

A. Grant a judgment permanently enjoining Defendants, their officers, agents, employees, successors, assigns and all persons in active concert or participation with them from violating the applicable provisions of ~~Section~~ ADEA § 4, 29 U.S.C. § 623. ~~4 of the ADEA and from engaging in any employment practice which discriminates because of age.~~

C. ~~B.~~ Order Defendant~~s~~ Committee to make whole John Mitro and all other persons adversely affected by the discriminatory practices described herein, by providing the affirmative relief necessary to eradicate the effects of such discriminatory practices.

D. ~~C.~~ Order Defendant~~s~~ Committee to make whole those persons adversely affected by the discriminatory practices described herein by enjoining the continued withholding of amounts of backwages plus interest owing as a result of the violation of the ADEA, in amounts to be proved at trial pursuant to ~~Section~~ FLSA § 17 ~~of the Fair Labor Standards Act~~, 29 U.S.C. § 217; and by ordering payment of an equal sum as liquidated damages, pursuant to ~~Section~~ FLSA § 16(c) ~~of the Fair Labor Standards Act~~, 29 U.S.C.

B. Grant a judgment permanently enjoining Defendant Committee from denying ~~the~~ pre-retirement salary increments to employees aged 55 ~~through~~ 70 who seek to participate in the retirement incentive plan described herein.

29 U.S.C. § 216(c), to John Mitro and all other persons adversely affected by Defendants' violations of the ADEA.

✓ E. ~~D.~~ Grant such further affirmative relief as the Court may deem just and proper.

✓ F. ~~E.~~ Award the Commission its costs in this action.

JURY DEMAND

The Commission requests a jury trial of all questions of fact raised by its complaint.

✓ JOHNNY J. BUTLER
✓ ~~DAVID L. SLATE~~
General Counsel (ACTING)

MICHAEL A. MIDDLETON
Associate General Counsel

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OFFICE OF THE
GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Paul 7/23/84

July 20, 1984

DOT -
Xerox and
assign as
indicated below.
7/20

MEMORANDUM

TO : Michael A. Middleton
Associate General Counsel
Trial Services

FROM : Johnny J. Butler
General Counsel (Acting)

RE : Early Retirement Cases that Former General Counsel
Rejected

BRENNER

At the SCIP/SCEP meeting this week it was revealed that the former General Counsel had rejected some early retirement cases which had been sent to him for litigation recommendation. Chairman Thomas, Commissioner Webb, and Commissioner Gallegos request that those cases be placed on the Commission agenda.

'lly*
'llie
'huck
RON
LISS*

I would also like a listing for FY '84 of the number of PM's recommended by the Regional Attorneys, the number approved by General Counsel and forwarded to the Commission, the number rejected by General Counsel, the number approved by the Commission, and the number rejected by the Commission. With respect to the rejections by the Commission and the General Counsel I would like to know the name of the cases and the reason for the rejections.

Also, I would like to remind you that I want you to develop a tracking system for all PM's, Subpoena Appeals, and Appeals Recommendations, somewhat akin to "status sheets" used by compliance personnel in the field offices. In addition, you need to establish some suggested processing times for these matters. The tracking systems, and suggested processing times should be submitted to me within thirty days.

Chuck

UNITED STATES GOVERNMENT
# memorandum

MAM 7/31

DATE: July 24, 1984

REPLY TO ATTN OF: Robert L. Williams
Regional Attorney

SUBJECT: Mitro v. Natick School Committee (011-82-0822)
Mitro v. Natick Education Association (011-82-1041)

TO: Michael A. Middleton,
Associate General Counsel
Trial Services Division

Pursuant to my conversation over the telephone today with Paul Brenner, this case is being resubmitted.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

★ GPO : 1983 0 - 381-526 (9073)

OFFICE OF THE
GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUN 25 1984

JUN 29

MEMORANDUM

TO : Robert L. Williams
Regional Attorney
New York District Office

FROM : Michael A. Middleton
Associate General Counsel
Trial Services Division

RE : Mitro v. Natick School Committee
& Natick Education Association
Charge Nos. 011-82-0822 & -1041

For reasons stated in the attached staff review memorandum, this Age Discrimination in Employment Act case is being returned without approval or rejection of your litigation request, in order to await the Commission's adoption of an enforcement policy regarding early retirement incentive plans.

The duplicate Presentation Memorandum files are returned herewith.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

OK Paul
6/22

June 21, 1984

M E M O R A N D U M

TO : Michael A. Middleton

FROM : Paul D. Brenner

RE : Review of Presentation Memorandum-
Natick [Mass.] School Committee, &
Education Association of Natick

I recommend against litigating this ADEA case, submitted by the New York District Office, until such time as the Commission formulates an enforcement policy on early retirement incentive plans.

The case involves a collectively bargained, early retirement incentive plan for teachers, which was implemented in September 1978 and is still in effect. Under Respondent's plan, teachers between the ages of 55 and 61 are given an automatic 10 percent salary increase upon announcing their voluntary election to retire at the end of the school year. Such salary increases substantially enlarge the amount of the teachers' annual pensions, which are based in part on their final annual salaries.

The alleged violation in this case stems from the fact that teachers aged 62 and older are excluded from participation in the retirement incentive plan. For example, the Charging Party was age 64 when she announced her intention to retire at the end of the 1981/82 school year; and thus, she was ineligible to receive the 10 percent salary increase. However, CP could have taken advantage of the retirement incentive program when it was first implemented in 1978; and thus, she arguably suffered no cognizable injury when she later retired. Moreover, CP arguably mitigated any damages she suffered not only by continuing to collect her pay check, but also by earning additional pension credits (more years of service and higher annual salaries) between 1978 and 1982.

The Commission has not yet taken any position on the application of the ADEA to retirement incentive plans, although the entire matter is under continuing study by the Office of Legal Counsel and SCEP. Therefore, until such time as the Commission does adopt an enforcement policy on the subject, it would be inappropriate to consider this case for litigation. See e.g., attached memorandum, Middleton to Williams, Feb. 10, 1984, re North Tonawanda Board of Education, in which OGC/Trial declined to recommend that the Commission litigate a similar case involving an early retirement incentive plan.

July 27, 1984

To: Don Reisler
From: Judy Mathis

POINTS OF DISCUSSION

Thanks again for the assistance you and Mark Richardson provided yesterday in the meeting at Xerox Headquarters. We feel the meeting was productive and that the contribution by you and Mark greatly enhanced the knowledge we gained.

We wish to set up promptly the third conciliation meeting with Xerox. During that meeting we plan to show, at least in overall figures, a statistical disproportion, by age, in the employees terminated over the applicable years. Showing this disproportion is sufficient to support the inference, during conciliation, that each class member is entitled to relief.

Following are possible statements we would like to be able to make at this meeting:

A. When we select those whose annualized salaries are $20,000 or greater (to eliminate all but sales and professional employees):
   1. __________ were terminated between 1980 and 1983
   2. __________ were hired between 1980 and 1983

   we would like to divide these terminees and hires by ages and display side by side

   the same figures for all those whose title is sales rep;
   the same figures for all those whose title is engineer.

B. For those with salaries $20,000 or greater, the comparison by age of those terminated between 1980 and 1983 with those who are active as of 12/31/83 shows: ______________________

   the same figures for all those whose title is sales rep;
   the same figures for all those whose title is engineer.

   the percent of employees who were over 45 or 50 (or whatever age appears to be a break point) at termination compared to the percent of employees at that age who are among actives as of 12/31/83.

C. For a 3 month period (to be chosen by DBS), for all those whose title is sales rep and for all those whose title is engineer:
   1. number and average age and average tenure of terminees
   2. number and average age of hires into the position title
   3. the average tenure of actives, as of 12/31/83, in the position title

We of course are open to your advice as to the reliability and effectiveness of these statements and also to your suggestions of other points we may wish to make. We would like to break the analysis down to specific divisions, but the lack of consistent meaning in the organization codes may make separation into units smaller than group level too time consuming at present. The list of statements we wish to make are listed in descending order of prioity.

In order to compose a letter to Xerox outlining the lack of cooperation in providing adequate responses to our request for information, we need to be certain we understand and comprehend the implications of the information given us by Mr. Stone. Please comment on or correct these tentative conclusions we have reached:

1. Stone has known since the computer files were constructed that they do not the contain meaningful descriptive data regarding position, division and department which our request for information specifies in 1.e., 2.c., 3.c., 4.d., 6., and 7.d. He also knew that the job family codes would in part answer the request and Xerox chose to stay silent until 7/25 about the existence of the job family codes. (Phil Smith represented during our first meeting on March 13 that the job codes and organization codes would answer the specific parts of the request noted above) Stone has also known that the organization codes, beyond the first character, are without consistent meaning and that their assignment to a specific employee is arbitrary.

   We can only interpret this situation as a misrepresentation by Mr. Smith, as a failure by Xerox to respond adequately to our request for information, and as a lack of good faith by Xerox.

2. From the organization codes given in the files, only group level for individual employees can be consistently and reliably determined. Lower levels of organization are not uniformly coded and we have no coding information which gives the meaning of characters beyond the first second and third positions. Stone responded to my question about a list of those codes by saying they do not have such a list; that this information is kept by the group.

3. To look at all employees in a specific position we must rely on the position title as the job codes are not very meaningful.

4. We would like to have the job family codes, along with a dictionary of their meanings, names of employees and a year end file of active employees as of 1980, 1981, and 1982. How important are these?

Please add any additional conclusions you have made which you think we should include in our letter to Xerox.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

[NOTE: ACCORDING TO JAMES FINNEY, THIS MEMORANDUM WAS FORWARDED TO MEMBERS OF THE COMMISSION IN EITHER LATE JULY OR EARLY AUGUST OF 1984.]

TO: Clarence Thomas
Chairman

Tony Gallegos
Commissioner

William A. Webb
Commissioner

Fred W. Alvarez
Commissioner

THRU: Treva McCall
Executive Secretariat

THRU: Odessa M. Shannon, Director
Office of Program Operations

FROM: James H. Finney, Director
Systemic Programs

SUBJECT: Request for Approval for Funding of Expert's Services Contract in EEOC v. Xerox

After a several months of investigation of allegations of age discrimination by the Xerox Corporation, Systemic Programs issued a Letter of Violation of the Age Discrimination in Employment Act on April 19, 1984. The Conciliation which has followed issuance of the Letter, pursuant to the provisions of the ADEA, has been conducted by the Litigation and Coordination Division of Systemic Programs. From the responses by Xerox, it appears that the company is unwilling to provide the relief which would settle this charge and that the chances of successful conciliation are slim. While we continue to hope that we can resolve this apparent violation of the ADEA short of litigation, we must be ready to move quickly to prosecute a lawsuit should conciliation fail. We are at a point in our negotiations where we expect to make the decision that conciliation has failed within thirty days. Because the contracting process is a lengthy one, we are seeking funding approval now so that the contract for expert services will be in place at the time we anticipate filing suit, should our estimation of Xerox's response prove correct.

Since 1980 the Xerox Corporation has terminated thousands of employees nationwide during reductions in force. The evidence we have examined indicates that approximately 5000 professional and sales employees who were age forty or over were terminated or forced to retire, particularly during 1981 and 1982. These employees appear to have had average annual salaries of about $40,000. Though Xerox has said the massive terminations were required to reduce the number of employees, from May, 1980 to March, 1983 Xerox hired more people than were terminated. Almost none of those hired were over forty. While sales employees were being terminated in large numbers, ads appeared in major newspapers almost every Sunday seeking applicants for the very jobs from which older employees were terminated. Engineers just out of college have replaced many of those who were told that their jobs were being eliminated. Memoranda from Xerox officials explaining reorganizations state that cost cutting can be achieved by "replacing senior, highly paid professionals with hires who are new college graduates."

It appears that allegations of age discrimination by many former highly paid employees and the existence of a private lawsuit alleging age discrimination have greatly influenced the Xerox response to our Letter of Violation. 1/ Considerations related to the defense of that lawsuit have made the company reluctant to conciliate or to negotiate any kind of settlement. Xerox has, during our investigation, failed to give us data that is meaningful data, has misrepresented the meaning of data given, and has deliberately misled us concerning documentation of computer files. Considerable analyses at a highly sophisticated level is necessary to discover and overcome these kinds of tactics.

Should the Commission file suit, it is anticipated that the suit would be venued in New Jersey and would be consolidated with Lusardi for purposes of discovery. The two attorneys representing the plaintiffs, members of small firms in New Jersey, have been very competent in prosecuting this suit, but their lack of resources compared to those of Xerox is notable. The class of plaintiffs the Commission would represent would include the approximately 3800 former employees not covered by Lusardi and would provide certain further relief for the plaintiffs who have opted into the private suit. Our Presentation Memorandum seeking authorization to file a lawsuit would of course explore further the relationship of the Commission's suit to the private one.

Our Letter of Violation was accompanied by a Request for Information which included extensive and specific requests for computer files. In attempting to analyze these data and to get adequate documentation for the files, we have discovered that the computerized Xerox Personnel Data System is very sophisticated and that the company is quite adept at using this system to mask possible age discrimination. There are so many Xerox employees, about 56,000 on this computerized computerized system, that obtaining relevant statistical showings of the effects of actions toward 5000 people can be defeated by the shear numbers contained in the system. Because of the nature of this employer's business and personnel records and as a result of the numbers of potential plaintiffs, we anticipate that a lawsuit would be fought to a large extent over statistical inferences from data and that the core of our evidence will come from a data base created from Xerox computer files.

We have, from the beginning of our investigation, examined our alternatives with a view toward proceeding into litigation which is as manageable, efficient and economical as possible. We believe that hiring an outside firm to provide the necessary statistical, analytical and computer services is imperative in a case such as this. We have found ~~that~~ resources to perform even the basic computer services are unavailable within the Commission. In addition, the credibility of the statistical evidence we develop is enhanced by testimony of an outside expert. This case could conceivably explore new issues such as the ways legal requirements under the ADEA impact on a company's perceived need to cut costs and to avoid technological obsolescence. A successful lawsuit against Xerox involving thousands of plaintiffs who made high salaries could conceivably result in the award of millions of dollars of backpay and retirement benefits.

Successful litigation of such a suit requires the kind of services for we which request authority to contract. We computed the amount of the proposed contract, $141,000, through an estimation of necessary services to be performed based on our past experience of their cost. Our original internal budget projection of $150,000 has been reduced by $9000 which has been already committed to fund a purchase order for computer and statistical analyses during our investi-

Included in this package is a Statement of Work which describes the tasks we believe may become necessary during the conduct of the complex litigation we contemplate. While this memorandum speaks in general terms of the work we wish to have done, the Statement of Work sets forth specifically the tasks for which we would contract. We request that you approve the funding of a contract for the performance of this work.

1/ Lusardi v. Xerox, an ADEA class action lawsuit filed in New Jersey in March, 1983, has been joined by about 1200 former Xerox employees from around the country. The ADEA is enforced through provisions of the Fair Labor Standards Act 29 U.S.C.§ 626(b)(1976). In accordance with § 16(b) of the FSLA, plaintiffs in ADEA class actions must affirmatively opt into the class with a written consent. The Lusardi opt-in period ended in May, 1984.

DBS
CORPORATION 1901 NORTH MOORE STREET, ARLINGTON, VIRGINIA 22209, (703) 527-9060

MEMORANDUM

TO: Judy Mathis

FROM: Donald L. Reisler DLR

DATE: July 31, 1984

CONTRACT: 4/1000/0922/0926/R

SUBJECT: Summary of July 25, 1984 Meeting with Xerox [illegible] the job code, exempt, [illegible]

The July 25, 1984 meeting at Xerox headquarters in Stamford, Connecticut provided us with a considerable amount of information regarding the six tape files that we are presently examining. Unfortunately, the documentation which was previously received was shown to be misleading, inaccurate, and generally wrong. We discussed these problems after the meeting. This memorandum contains a list of some of the more outstanding issues and observations.

1. Job Code. The job code provided in their files and documentation is meaningless. Apparently it is used as a label code for the names of jobs but has no systematic structure. In fact, Tom Stone said he would not use it at all.

2. Exempt Status. The first character of the job code was supposed to indicate the exempt status of the position. We were told that it no longer has any meaning for these purposes and their documentation is in error. Tom Stone said there is a proper code but we do not have it on our files.

3. Organization Codes. The organization codes can presumably be used to a limited extent. The highest levels of the code have meaning but the lower levels are used locally without systematic or consistent structure. Furthermore, the corporation has apparently reorganized each year and the codes are not consistent over time. The data for each year has to be looked at separately. Comparisons across time will be difficult, at best. We received a table of organization codes at the meeting, but Tom Stone made additions and annotations on this list even before we left.

4. Activity Status. The status of an employee is relatively difficult to determine and requires complex logic regarding the presence or absense of other records with different status. The procedure was explained to us and some additional documentation was provided. We have no way of knowing, at this time, whether their description is accurate.

   There are additional problems with the activity file. First of all, we need previous year's data to evaluate fully the status. This means the 1980 data cannot really be used since we do not have 1979. Thus, 1980 is really used for the 1981 file. Second, we only have the December 31, 1983 data for the active employees. We cannot reconstruct the individual year end "active files." Tom Stone suggested an analysis that needed this number as the denomination of a ratio. Since we cannot complete it, we have a serious problem for a major category of evaluations of hire and termination ratios. I think we need this data.

5. Job Family Code. There is (apparently) a Job Family Code that we would use to determine the functional job status, e.g. engineer, etc. across the company. We do not have this data and that entire category of analysis is precluded. There is a national "dictionary" of codes that is used at the local level to assign jobs to people. Clearly we should have access to this data and the dictionary.

6. Tom Stone. He seemed to understand how inadequate what we had received was for our purposes. He admitted that he designed the files that we received although someone else did the programming. He suggested that Xerox did internal analyses that are similar to what we are examining. Perhaps in discovery we can obtain these reports. He did not even attempt to claim that the documentation he had provided was adequate or accurate. It seems they have a computer maintained data dictionary and they used it to produce, in an automated way, our documentation. It is hard to believe that he was truly innocent in this sequence of events that have cost EEOC six months (at least) and have left us with grossly inadequate data.

7. Summary. It seems obvious that we do not have adequate data, the documentation is of minor value, and their previous representations to Judy Mathis were misleading (at best). We are left, however, without an easy route to perform the analyses that EEOC really needs since the data tapes are surely flawed. I do not believe they made deliberate errors or regrouped the data differently. Instead, they used obsolete data items that seemed, on their face, to be relevant but upon examination are of very little true value. We have serious problems with the tapes and our conclusions will be of limited power.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

August 1, 1984

Philip E. Smith, Esq.
Associate General Counsel
Xerox Corporation
P. O. Box 1600
Stamford, Connecticut 06904

Dear Mr. Smith:

Thank you for making Tom Stone available to us for the technical meeting concerning the computer files you have provided in response to our Request for Information. His explanations of the logic of termination codes were useful and the descriptions of the organization codes and job codes were particularly enlightening. The explanation that the characters making up these codes no longer have specific meaning helped us pinpoint some of the reasons for the difficulties we have experienced in reading these tapes.

During our first meeting on March 13, 1984, Xerox represented that request numbers 1.e., 2.c., 3.c., 4.d., 6., and 7.d., which ask for employees' position, department, division, and group would be answered by supplying the PDS job codes and organization codes. Since receiving the tapes soon after that meeting, we have repeatedly requested documentation to enable us to interpret most of the codes on the tapes. While discussing the lack of this essential information, both during meetings with Xerox and during the June 8 conference call with Mr. Stone, Xerox has asserted that all necessary documentation has been provided. We learned from Mr. Stone for the first time on July 25, 1984 that the job codes and organization codes lack sufficient meaning, within the Xerox Personnel Data System, to answer the requests for information noted above. We learned, for the first time, of the existence of job family or functional codes which, according to Mr. Stone, would be necessary to compare specific positions as there is, for example, no one job code to designate engineers. He explained that the assignment of job codes is made by individual compensation managers. He further explained that he knows of no way this code could be used in the analysis of the data.

In addition, we learned for the first time that the organizational codes no longer have consistent meaning below the group level. Lower levels of organization are not uniformly coded and we have been provided with no coding information which gives the consistent meaning of characters beyond the first position. Mr. Stone stated that headquarters does not have a list of the meanings of these lower level codes; that this information is assigned by and kept by the groups.

Xerox has requested that the EEOC listen to its "side of the story" concerning the allegations of violations of the ADEA. We have spent considerable time, effort, and money in an attempt to read and analyze the Xerox computer tapes which Xerox has represented as showing that the company has not violated the ADEA. However, after attempting to do so we now find that the company has misrepresented from the beginning the kind of information provided. During our technical meeting it became clear that Xerox has known from the date of the creation of these tapes that the data provided were not entirely responsive and that the documentation, since provided in bits and pieces over a three month period, was incomplete, misleading and sometimes inaccurate. As we have assured you during our meetings, we have every desire to be fair and to consider seriously the evidence offered by Xerox. Although the tapes were promptly provided and contain many entries of data, it is clear that Xerox has known since the beginning that many of these data are reliable only on a general level showing gross numbers.

We have explained during our meetings that the Commission looks at information concerning possible ADEA violations from many sources. During the conciliation period, despite our frustrating experience with the computer tapes, we have continued to gather data from many other places. We have regarded the tapes as the evidence offered by Xerox that it has not discriminated on the basis of age and have believed, up to now that the company's efforts in preparing them reflected a sincere desire to present its viewpoint concerning events in dispute.

Because the numeric job codes are an inadequate response to our request for information, we ask that you provide the job family or functional codes which will answer these questions. Our continuing request for names of employees is not additional but was included as the first item in each of our original requests regarding employee information. We must reiterate that there has been no understanding that we would forego that request and indeed, when we review the agenda prepared by Xerox before our first meeting, employee names is not included under the heading 'Confidentiality' which was one of the issues for discussion identified by Xerox.

We feel that we are unable to devote more time to attempt to analyze these tapes in depth and we wish to schedule a conciliation meeting to discuss substantive issues of alleged discrimination and appropriate affirmative actions by Xerox within the next three weeks. Because of a possible schedule conflict with another case in active litigation, I am unable to commit myself to a specific date until the first of next week. I will be in touch with you at that time to settle on a mutually convenient day for our meeting.

We have considered your request for a protective order to encompass the information you have given us. After discussing your request at higher levels within the Commssion we have decided that the proposed protective order would be contrary to EEOC policy and would not be appropriate under these circumstances. While such protective orders are sometimes entered in active litigation, in an investigation such as this it is unclear who would decide whether such an order had been breached and what sanctions, if any, would be available to Xerox. In any investigation we undertake, whether on the local office or headquarters level, we are concerned that data received from employers remain confidential and that the privacy of employees' personal data is guarded. We have, therefore, carefully developed policies, procedures and guidelines for use in the agency which we believe adequately meet the concerns you have expressed. In the instant case, we are confident that the persons with access to the data you have provided are conscious of and will respect its confidentiality.

I will be in touch with you around August 7, 1984 to finalize the date of our next conciliation meeting.

Sincerely,

James N. Finney,
Associate General Counsel

Leroy T. Jenkins, Jr.
Assistant General Counsel

Carlton L. Preston by Jm
Carlton L. Preston
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

August 8, 1984

TO: Cynthia Matthews
Special Assistant to the Chairman

THRU: James N. Finney
Associate General Counsel

FROM: Leroy T. Jenkins, Jr.
Assistant General Counsel

SUBJECT: Investigation of Allegations of Age Discrimination Against the Xerox Corporation

This memorandum is in response to your request for information regarding the Commission's actions toward the Xerox Corporation. Following is a chronology of events during our investigation and conciliation of charges of age discrination against the Xerox Corporation.

Initial Investigation

In August 1983, during routine monitoring of discrimination lawsuits, Systemic Programs became aware of a private class action lawsuit filed against Xerox in New Jersey in March, 1983. *Lusardi* v. *Xerox* alleges that Xerox has discriminated across the board against present and former employees and applicants aged from forty to seventy. We then found that more than forty-five charges had been filed with EEOC district and area offices, all of which alleged that Xerox had terminated them on the basis of their age. (the number of charges filed has now grown to 62) As we pursued this matter, we found increasing evidence to support the claims made by plaintiffs in *Lusardi* v. *Xerox*, particularly in regard to terminations of salaried professional and sales employees.

After considering the merits of intervening in *Lusardi* v. *Xerox*, we decided for many reasons that proceeding with our own investigation and filing a direct lawsuit, should that step be warranted, would be a more desirable course to follow. From September, 1983 through January, 1984 we continued to interview charging parties and plaintiffs, we reviewed data received by the private plaintiffs in discovery, and reviewed information submitted by Xerox to district offices during investigations of previous charges. Analysis of data and interviews continued to add further evidence supporting the allegations of age discrimination by Xerox.

Delegation of Authority to Initiate Direct Investigation

Pursuant to 29 C.F.R. Sections 1626.15 (a) and 1620.19 (a), the Commission has authority to investigate violations of the Age Discrimination in Employment Act (ADEA). In the exercise of these investigatory powers, Sections 1626.15 (e) and 1620.19 (a) authorize the General Counsel, the District Directors and the Director of the Office of Program Operations or their designees to initiate investigations of alleged violations of the ADEA. On February 7, 1984 the Director of the Office of Program Operations delegated to the Director of Systemic Programs the authority to initiate a Direct Investigation of the Xerox Corporation with respect to policies and practices which have possibly resulted in discrimination on the basis of age.

Direct Investigation

On February 7, 1984 the Director of Systemic Programs, sent a letter to Douglas M. Reid, the Vice President for Personnel of the Xerox Corporation, which announced that the Commission was initiating an investigation to determine whether there is reasonable basis upon which to conclude that the ADEA has been violated. Accompanying this letter was a Request for Information which asked for computer files of Xerox employment data. We also notified district and area offices that the investigation of all age charges against Xerox would be consolidated and be directed from headquarters.

Our first meeting with Xerox officials was on March 13, 1984 in Washington. Philip E. Smith, Associate General Counsel, is representing the company and coordinating Xerox responses during this investigation. Though we had requested that Mr. Smith bring with him a Xerox employee familiar with its computerized employee data system, no such person was provided. The Xerox position, first stated during that meeting and consistently presented since, is that the reductions in force undertaken over the past three years have been carried out in a non-discriminatory manner and the persons selected for termination were chosen through the use of objective criteria. During that meeting we also discussed the Xerox response to our Request for Information.

During this meeting, we informed Xerox of the allegations of age discrimination of which we had become aware and explained the administrative steps, set out in the Act and regulations, which we would follow. We assured Xerox that we will carefully consider its explanations and its "side of the story" concerning the alleged discriminatory events.

Though Xerox initially asserted that the minimum time necessary to respond to our Request for Information was twenty-seven weeks, within two weeks of our meeting much information had been submitted. We have since found that much of the coding documentation originally requested was omitted or was only submitted in the past two weeks after repeated requests. We have also found that Mr. Smith misrepresented, during the March 13 meeting, that the data he described would answer specific parts of our Request.

Both during this meeting and in subsequent correspondence, we expressed our concern that because the statute of limitations was running, the claims of many potential victims of discrimination would soon become untimely. (the ADEA has a two year statute of limitations, or three years in the case of a wilfull violation) Xerox declined to toll the running of the statute while we proceeded with our investigation.

Letter of Violation

On April 19, 1984 the Commission issued a Letter of Violation to the Xerox Corporation, stating that the company has discriminated against salaried employees and former employees within the age group from forty to seventy and noting in particular the Xerox practice of selecting employees for termination on the basis of age. According to the provisions of the ADEA, issuance of the Letter tolled the running of the statute and began a period of Conciliation.

The Letter of Violation was issued after careful consideration of the evidence we had examined, of the rights of aggrieved persons, and of the alternative actions open to the Commission. The evidence which we had been gathering for nine months offered increasing support and confirmation of allegations that Xerox had, during reductions in force since 1980, terminated professionals and sales representatives on the basis of their age. Documents and testimony by former executives indicated that the company had a deliberate, corporate directed policy to eliminate senior, higher paid employees as a costcutting measure.

During the relevant years, Xerox terminated approximately 12,000 salaried employees, of whom about 5,000 were forty or over at termination. Because of massive reorganizations of divisions and transfers of employees during these years reliable, overall statistics have been difficult to verify. There is evidence that Xerox has made deliberate efforts to reorganize and move employees to mask possible age discrimination. The reductions in force were undertaken in every major Xerox group on a nationwide basis. They seem to have been concentrated, however, in the groups and divisions which manufacture and sell copiers. During these reductions in force, Xerox had continued to hire professionals and sales representatives directly out of college to replace older employees who were fired or forced to retire. Xerox had continued to solicit applicants, through ads in major newspapers around the country, for the very positions from which older employees had been terminated and told their positions had been abolished. Almost none of the persons hired were forty or over.

Conciliation

We again met with Xerox officials on May 23, 1984. As required by §7 (b) of the ADEA, we informed them that the Commission may decide to file a lawsuit should conciliation fail and that terminated employees may potentially recover backpay from Xerox. We again assured Xerox that it may respond to our charges and may express its views concerning the disputed actions and that we will carefully consider those views. Our presentation included a lengthy review of the evidence which indicates that Xerox has violated the ADEA in disproportionately terminating older employees on the basis of their age.

Xerox has represented to us that the computer tapes supplied to us will vindicate its position that it has not violated the ADEA in its employment decisions. During the May 23rd meeting, we again requested that Xerox supply the documentation necessary to the analyses of these tapes. Xerox continued to maintain that because it has not discriminated on the basis of age, it will not offer any relief to former or present employees. The company representatives expressed disbelief of the evidence we presented and maintained that the testimony of former employees is only a desire for revenge by sad and bitter people.

Throughout the conciliation period we have corresponded with company attorneys by mail and in telephone calls. In an attempt to resolve the technical problems with the computer tapes submitted by Xerox, we went to company headquarters and met, for the first time, with the computer expert who created these tapes. He revealed to us that the original data had been misrepresented and that he had known from the beginning that some of the data submitted are misleading or useless.

Current Status of Conciliation

Our next conciliation meeting is tentatively scheduled for August 17, 1984. Mr. Smith of Xerox has said they plan to bring top level company policy makers and that they will make an extensive presentation of their case to us. We have planned at that meeting to present to Xerox the findings of our computer consultant that the company's employment actions, as reflected by the Xerox tapes, show a statistical disparity on the basis of age.

It appears that considerations related to the defense of the private lawsuit mentioned above, along with many allegations of age discrimination by former high level Xerox executives, have greatly influenced the company's position during conciliation. Lusardi v. Xerox has been joined by approximately 1300 plaintiffs, nationwide, as of May 9, 1984, when the opt-in period for plaintiffs ended. Xerox has hired two prestigious outside law firms to represent the company in the defense of that action and has so so far taken three appeals, all unsuccessful, to the Third Circuit. Company officials have been openly concerned that the EEOC might also join in that suit. At stake here are millions of dollars in back pay and retirement benefits to a potential class of 5000, many of whom made in excess of $50,000 a year.

Summary

We hope this summarized account of the Commission's actions in investigating and concilating the charges of age discrimination against Xerox is helpful to you. In an effort to be brief, we have not reviewed the evidence we have gathered and analyzed in any depth. We would be happy to answer further any questions you might have and will make staff members available for discussions if you so wish.

RETURN TO
PAUL BRENNER

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. [illegible]

OFFICE OF THE
GENERAL COUNSEL

August 15, 1984

REJECTED
BY COMM. -
9/4/84 : 0-4

M E M O R A N D U M

TO : Michael A. Middleton

FROM : Paul D. Brenner

RE : Review of Presentation Memorandum from the New York District Office-Natick [Mass.] School Committee, & Education Association of Natick

I concur in the recommendation to litigate this ADEA policy case, which raises a novel issue concerning an early retirement incentive plan.

The case was originally submitted by the New York District Office in June 1984, but was returned without approval or rejection of their litigation request, "in order to await the Commission's adoption of an enforcement policy regarding early retirement incentive plans." See attached memorandum, Middleton to Williams, dated June 25, 1984. However, several Commissioners recently requested that such cases be recommended for litigation without awaiting the adoption of a formal enforcement policy. See attached memorandum, Butler to Middleton, dated July 20, 1984. Accordingly, this case was expressly recalled from the district office for OGC consideration. See attached memorandum, Williams to Middleton, dated July 24, 1984.

The case involves Respondents' collectively bargained, early retirement incentive plan for teachers and administrators. That plan was first implemented in 1978, "[i]n order to provide an incentive for early retirement for those who so desire, and in order to preserve job opportunities for younger [employees] who would otherwise face a reduction in force." However, as modified in 1981, Respondents' plan is still in effect.

Under that plan, employees between the ages of 55 and 61 are given an automatic 10 percent salary increase upon announcing their voluntary election to retire at the end of the next school year. Such salary increases substantially enlarge the amount of the retirees' annual pensions, which are based in part on their final salaries. The alleged violation in this case stems from the fact that persons aged 62 and older are excluded from participation in the retirement incentive plan. For example, the Charging Party was age 64 when he announced his intention to retire at the end of the 1981/82 school year. Thus, CP was ineligible to participate in Respondents' plan.

There is little doubt that the overt age limitation in Respondents' plan constitutes a per se violation of ADEA Sections 4(a) and (c). There is also little doubt that Respondents' plan is not exempt by virtue of ADEA Section 4(f)(2), since the only direct benefit is a straight 10 percent salary increase. Nonetheless, there is at least some doubt as to whether Respondents' plan results in any injury or damage to employees who wish to retire after attaining age 62.

The doubt arises from the fact that, except for the initial start-up period which is now beyond the statute of limitations, all employees aged 62 or older had the opportunity to participate in Respondents' plan when they were age 61 or younger. For example, the CP in this case could have taken advantage of the early retirement incentive plan when it was first implemented in 1978; and thus, he arguably suffered no cognizable injury when he retired in 1982, at age 64. Moreover, even if he did suffer an injury, he arguably mitigated any damages by continuing to collect his pay check and also by earning additional pension credits (more years of service and higher annual salaries) between 1978 and 1982.

However, even assuming that no injury or damages could be proven on behalf of the CP and other similarly situated individuals, I would still concur in the litigation recommendation. The stated purposes of the ADEA are "to prohibit arbitrary age discrimination in employment" (such as the overt age limitation at issue in this case), and "to promote the employment of older persons" (not to encourage their early retirement for fear of losing out on an age-based incentive). See ADEA Section 2(b). Therefore, in addition to the usual prayers for relief, I recommend that the Commission expressly seek to enjoin the denial of pre-retirement salary increases for employees aged 55 to 70 who wish to participate in the retirement incentive plan. See new relief ¶B in the draft complaint.

N.B.: Attached for your review and possible signature is the draft of a memorandum to the Commission explaining OGC's litigation recommendation in this case.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

MEMORANDUM

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred W. Alvarez, Commissioner

FROM : Michael A. Middleton,
Associate General Counsel

RE : Litigation Recommendation --
Natick [Mass.] School Committee,
& Education Association of Natick

The Office of General Counsel concurs in the recommendation of the New York District Office to litigate this ADEA policy case, which raises a novel issue concerning an early retirement incentive plan.

The case was submitted by the district office in June 1984, but was returned without approval or rejection of their litigation request, to await the Commission's adoption of an enforcement policy on early retirement incentive plans. However, several Commissioners recently requested that such cases be recommended for litigation even before the adoption of a formal enforcement policy. Accordingly, this case was recalled from the district office for OGC consideration.

The case involves Respondents' collectively bargained, early retirement incentive plan for teachers and administrators. That plan was first implemented in 1978, "[i]n order to provide an incentive for early retirement for those who so desire, and in order to preserve job opportunities for younger [employees] who would otherwise face a reduction in force." However, as modified in 1981, Respondents' plan is still in effect.

Under that plan, employees between the ages of 55 and 61 are given an automatic 10 percent salary increase upon announcing their voluntary election to retire at the end of the next school year. Such salary increases substantially enlarge the amount of the retirees' annual pensions, which are based in part on their final salaries. The alleged violation in this case stems from the fact that persons aged 62 and older are excluded from participation in the retirement incentive plan. For example, the Charging Party was age 64 when he announced his intention to retire at the end of the 1981/82 school year. Thus, CP was ineligible to participate in Respondents' plan.

There is little doubt that the overt age limitation in Respondents' plan constitutes a per se violation of ADEA Sections 4(a) and (c). There is also little doubt that Respondents' plan is not exempt by virtue of ADEA Section 4(f)(2), since the only direct benefit is a straight 10 percent salary increase. Nonetheless, there is at least some doubt as to whether Respondents' plan results in any injury or damage to employees who wish to retire after attaining age 62.

The doubt arises from the fact that, except for the initial start-up period which is now beyond the statute of limitations, all employees aged 62 or older had the opportunity to participate in Respondents' plan when they were age 61 or younger. For example, the CP in this case could have taken advantage of the early retirement incentive plan when it was first implemented in 1978; and thus, he arguably suffered no cognizable injury when he retired in 1982, at age 64. Moreover, even if he did suffer an injury, he arguably mitigated any damages by continuing to collect his pay check and also by earning additional pension credits (more years of service and higher annual salaries) between 1978 and 1982.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 11, 1984

TO: James N. Finney
Associate General Counsel

THRU: Leroy T. Jenkins, Jr.
Assistant General Counsel

FROM: Carlton L. Preston
Senio Trial Attorney

SUBJECT: Chronology of Events: Investigation of Allegations of Age Discrimination Against the Xerox Corporation

This memorandum is in response to your request for information regarding the Commission's actions toward the Xerox Corporation. Following is a chronology of events during our investigation and conciliation of charges of age discrination against the Xerox Corporation.

Initial Investigation

In August 1983, during routine monitoring of discrimination lawsuits, Systemic Programs became aware of a private class action lawsuit filed against Xerox in New Jersey in March, 1983. Lusardi v. Xerox alleges that Xerox has discriminated across the board against present and former employees and applicants aged from forty to seventy. We then found that more than forty-five charges had been filed with EEOC district and area offices, all of which alleged that Xerox had terminated them on the basis of their age. (the number of charges filed has now grown to 62) As we pursued this matter, we found increasing evidence to support the claims made by plaintiffs in Lusardi v. Xerox, particularly in regard to terminations of salaried professional and sales employees.

After considering the merits of intervening in Lusardi v. Xerox, we decided for many reasons that proceeding with our own investigation and filing a direct lawsuit, should that step be warranted, would be a more desirable course to follow. From September, 1983 through January, 1984 we continued to interview charging parties and plaintiffs, we reviewed data received by the private plaintiffs in discovery, and reviewed information submitted by Xerox to district offices during investigations of previous charges. Analysis of data and interviews continued to add further evidence supporting the allegations of age discrimination by Xerox.

Delegation of Authority to Initiate Direct Investigation

Pursuant to 29 C.F.R. Sections 1626.15 (a) and 1620.19 (a), the Commission has authority to investigate violations of the Age Discrimination in Employment Act (ADEA). In the exercise of these investigatory powers, Sections 1626.15 (e) and 1620.19 (a) authorize the General Counsel, the District Directors and the Director of the Office of Program Operations or their designees to initiate investigations of alleged violations of the ADEA. On February 7, 1984 the Director of the Office of Program Operations delegated to the Director of Systemic Programs the authority to initiate a Direct Investigation of the Xerox Corporation with respect to policies and practices which have possibly resulted in discrimination on the basis of age.

Direct Investigation

On February 7, 1984 the Director of Systemic Programs, sent a letter to Douglas M. Reid, the Vice President for Personnel of the Xerox Corporation, which announced that the Commission was initiating an investigation to determine whether there is reasonable basis upon which to conclude that the ADEA has been violated. Accompanying this letter was a Request for Information which asked for computer files of Xerox employment data. We also notified district and area offices that the investigation of all age charges against Xerox would be consolidated and be directed from headquarters.

Our first meeting with Xerox officials was on March 13, 1984 in Washington. Philip E. Smith, Associate General Counsel, is representing the company and coordinating Xerox responses during this investigation. Though we had requested that Mr. Smith bring with him a Xerox employee familiar with its computerized employee data system, no such person was provided. The Xerox position, first stated during that meeting and consistently presented since, is that the reductions in force undertaken over the past three years have been carried out in a non-discriminatory manner and the persons selected for termination were chosen through the use of objective criteria. During that meeting we also discussed the Xerox response to our Request for Information.

During this meeting, we informed Xerox of the allegations of age discrimination of which we had become aware and explained the administrative steps, set out in the Act and regulations, which we would follow. We assured Xerox that we will carefully consider its explanations and its "side of the story" concerning the alleged discriminatory events.

Though Xerox initially asserted that the minimum time necessary to respond to our Request for Information was twenty-seven weeks, within two weeks of our meeting much information had been submitted. We have since found that much of the coding documentation originally requested was omitted or was only submitted in late July after repeated requests. We have also found that Mr. Smith misrepresented, during the March 13 meeting, that the data he described would answer specific parts of our Request.

Both during this meeting and in subsequent correspondence, we expressed our concern that because the statute of limitations was running, the claims of many potential victims of discrimination would soon become untimely. (the ADEA has a two year statute of limitations, or three years in the case of a wilfull violation) Xerox declined to toll the running of the statute while we proceeded with our investigation.

Letter of Violation

On April 19, 1984 the Commission issued a Letter of Violation to the Xerox Corporation, stating that the company has discriminated against salaried employees and former employees within the age group from forty to seventy and noting in particular the Xerox practice of selecting employees for termination on the basis of age. According to the provisions of the ADEA, issuance of the Letter tolled the running of the statute and began a period of Conciliation.

The Letter of Violation was issued after careful consideration of the evidence we had examined, of the rights of aggrieved persons, and of the alternative actions open to the Commission. The evidence which we had been gathering for nine months offered increasing support and confirmation of allegations that Xerox had, during reductions in force since 1980, terminated professionals and sales representatives on the basis of their age. Documents and testimony by former executives indicated that the company had a deliberate, corporate directed policy to eliminate senior, higher paid employees as a costcutting measure.

During the relevant years, Xerox terminated approximately 12,000 salaried sales and professional employees, of whom about 4,000 were forty or over at termination. Because of massive reorganizations of divisions and transfers of employees during these years reliable, overall statistics have been difficult to verify. The data Xerox supplied us, in response to our Request for Information, is from its Personnel Data System which does not include 17,000 employees in some of its subsidiaries.

There is evidence that Xerox has made deliberate efforts to reorganize and move employees to mask possible age discrimination. The reductions in force were undertaken in every major Xerox group on a nationwide basis. They seem to have been concentrated, however, in the groups and divisions which manufacture and sell copiers. During these reductions in force, Xerox had continued to hire professionals and sales representatives directly out of college to replace older employees who were fired or forced to retire. Xerox had continued to solicit applicants, through ads in major newspapers around the country, for the very positions from which older employees had been terminated and told their positions had been abolished. Almost none of the persons hired were forty or over.

Conciliation

We again met with Xerox officials on May 23, 1984. As required by §7 (b) of the ADEA, we informed them that the Commission may decide to file a lawsuit should conciliation fail and that terminated employees may potentially recover backpay from Xerox. We again assured Xerox that it may respond to our charges and may express its views concerning the disputed actions and that we will carefully consider those views. Our presentation included a lengthy review of the evidence which indicates that Xerox has violated the ADEA in disproportionately terminating older employees on the basis of their age.

Xerox has represented to us that the computer tapes supplied to us will vindicate its position that it has not violated the ADEA in its employment decisions. During the May 23rd meeting, we again requested that Xerox supply the documentation necessary to the analyses of these tapes. Xerox continued to maintain that because it has not discriminated on the basis of age, it will not offer any relief to former or present employees. The company representatives expressed disbelief of the evidence we presented and maintained that the testimony of former employees is only a desire for revenge by sad and bitter people.

Throughout the conciliation period we have corresponded with company attorneys by mail and in telephone calls. In an attempt to resolve the technical problems with the computer tapes submitted by Xerox, we went to company headquarters and met, for the first time, with the computer expert who created these tapes. He revealed to us that the original data had been misrepresented and that he had known from the beginning that some of the data submitted are misleading or useless.

Current Status of Conciliation

Our next conciliation meeting is scheduled for September 12, 1984. Mr. Smith of Xerox has said they plan to bring top level company policy makers and that they will make an extensive presentation of their case to us. We have planned at that meeting to present to Xerox our evidence that the analyses of the data reflecting Xerox employment actions over the past three years, along with other information gathered, raise raise a strong inference of company wide pattern and practice of discrimination on the basis of age. An agenda and a brief summary of our evidence to be presented are attached.

It appears that considerations related to the defense of the private lawsuit mentioned above, along with many allegations of age discrimination by former high level Xerox executives, have greatly influenced the company's position during conciliation. Lusardi v. Xerox has been joined by approximately 1340 plaintiffs, nationwide, as of May 9, 1984, when the opt-in period for plaintiffs ended. Xerox has hired two prestigious outside law firms to represent the company in the defense of that action and has so so far taken three appeals, all unsuccessful, to the Third Circuit. Company officials have been openly concerned that the EEOC might also join in that suit. At stake here are millions of dollars in back pay and retirement benefits to a potential class of 4000, many of whom made in excess of $50,000 a year.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 11, 1984

MEMORANDUM

TO: James N. Finney
Associate General Counsel

THRU: Leroy T. Jenkins, Jr.
Assistant General Counsel

FROM: Carlton L. Preston
SR Trial Attorney

SUBJECT: Summary of Evidence Regarding Allegations of Age Discrimination by Xerox

During the fall of 1983 Systemic Programs began investigating allegations that Xerox violated the ADEA when it terminated massive numbers of employees during reductions in force between 1980 and 1983. As a result of the evidence gathered during our investigation, the Commission issued a Letter of Violation on April 19, 1984. Since that time, we have been engaged in discussions with Xerox in an attempt to resolve the charge short of litigation.

Lusardi v. Xerox, a private class action lawsuit alleging age discrimination by Xerox, was filed in New Jersey in March, 1983. Because the ADEA is enforced through the FLSA, plaintiffs in such a class action must affirmatively opt in. So far, 1340 plaintiffs from around the country have opted into the Lusardi action. These former and present Xerox employees, many of whom held or hold high positions, allege they were terminated, demoted and denied promotions on the basis of age and that the Xerox Corporation has pursued a deliberate corporate policy of reducing costs by eliminating older professional and sales employees and replacing them with new college hires or with younger employees.

Evidence concerning possible age discrimination by Xerox has been gathered from interviews with charging parties and plaintiffs in the private lawsuit, from information submitted by Xerox in response to our Request for Information, from statistical analyses of computerized data, and from data gathered by the Lusardi plaintiffs during discovery. A summary of significant evidence developed to date follows.

Documentary

1. Xerox company documents, which were introduced into court records July 12, 1984 as an attachment to plaintiffs' memorandum regarding matters to be discussed during a discovery conference, strongly suggest that a method used to achieve on going savings was the riffing of "higher paid/more tenured" people. The memorandum was part of a presentation of cost cutting measures undertaken by a major Xerox division.

2. There were more overall hires than terminations during the three year period when Xerox undertook what it has described as reductions in force. There are no clear indications that the overall Xerox workforce was significantly reduced in numbers after the actions described by the company as reductions in force.

3. Throughout the three year period of massive terminations, newspapers around the country carried ads seeking applicants for positions from which older employees had been laid off or had taken early retirement when told their alternative was to be laid off or fired.

Statistical

1. During the relevant period, from 1980 through 1983, there were 14,594 terminations and 16,325 hires of salaried employees by Xerox.

2. Work done by our computer analysts shows the ratio of hires to terminations as a function of age changed significantly within Xerox from 1980 to 1982. We assumed 1980, as a relatively stable year, was "normal" for Xerox and measured the ratio of hired to terminated for each year of age to establish a profile of "normal" Xerox patterns. Next we calculated the same ratio of hired to terminated by age for the year 1982. The profile of this 1982 ratio would have the same shape as the 1980 ratio if the pattern had remained the same. We found striking differences between the 1980 and 1982 ratios which show that Xerox shifted to hiring a relatively younger work force and to terminating workers at relatively older ages in 1982 than in 1980.

3. Of the engineers who were terminated between 1980 and 1983 through reductions in force, 23.6% were between the ages of 51 and 60. This age group accounts for 13.7% of current active engineers.

   The youngest group of engineers, aged from 23 and 30, is the group from which the largest propotion of terminees would be expected in Reductions in Force since Xerox policy is to select for RIF those with least tenure and lowest age. People between the ages of 23 and 30 make up 17.6% of current engineers but account for only 12.5% of the engineers terminated in Reductions in Force.

4. For all employees in the professional and sales categories the people between ages 23 and 30 make up 17.4% of the actives in that group, while they account for only 10.5% of the Reduction in Force terminees. Employees in the age group from 51 to 60 accounted for 8.4% of active employees, while they made up 21.7% of Reduction in Force terminees.

The usefulness of computer files supplied by Xerox has been diminished by the failure of the company to provide coding information necessary to read much of the data on the tapes despite repeated assertions that they had given us the codes requested. Because of Xerox's misrepresentations of the meaning of data, we have spent considerable time, money and effort attempting to analyze the computer data which is available only from Xerox.

Testimonial

Several former employees who were in high level positions have come forward to allege that Xerox has pursued a deliberate corporate policy of eliminating senior professionals and sales employees to save money on current salaries and prospective retirement benefits. The written statements of a former Human Resources Manager for a major Xerox division amplify this allegation and are attached as Appendix 2. In addition to his written statements, this witness states that he was instructed to recruit and hire new college graduates to fill the positions from which about 250 employees had been recently terminated. He notified the Xerox attorney assigned this division that possible age discrimination had been involved in the decisions to terminate many older employees. The witness alleges that the Xerox attorney agreed that the files were devoid of necessary documentation and that they showed a severe problem with potential ADEA violations. This witness believes the files were documented after he left, which was about five months after the terminations took place.

Many Lusardi plaintiffs, charging parties and potential witnesses have been interviewed. Though they worked in various positions and Xerox facilities and divisions around the country, their allegations are much alike: that older employees, paricularly those over 50, were in some way targeted for elimination, were counselled that they should take the termination package offered or risk being laid off or fired with no benefits, often that they were replaced by younger employees with less tenure or with new college graduates, and that they found other open jobs within the company to which they were denied transfer.

1 1 1983

CSO FIELD STRUCTURE

TASK FORCE

- o **OBJECTIVE**
  - CENTRALIZED/CONSOLIDATE CUSTOMER SUPPORT FUNCTIONS (ADMIN., WORK SUPPORT, FIELD TRAINING, EQUIPMENT CONTROL, AFTER SALE SERVICES) OUT OF BRANCHES AND INTO 10 REGION CITIES.
- o PILOT IN DALLAS IN 1983, NATIONAL LAUNCH IN 1984/85.
- o ON GOING SAVINGS ... $26 MILLION (HEADCOUNT REDUCTIONS AND RIFFING HIGHER PAID/MORE TENURED PEOPLE WITH GRADE 3 ENTRY LEVEL)
- o ONE TIME IMPLEMENTATION COST ... $30 MILLION (CONTINUANCE, RELOCATION, TRAINING)
- o NET SAVINGS/COST:

1983/84	1985	1986
$ (14.8)	$ 8.3	$ 25.0

- o LOW COST CITIES ALTERNATIVE RESULTS IN ADDITIONAL ANNUALIZED SAVINGS OF $9M. THIS RESULTS IN 85% INEXPERIENCED PEOPLE VERSYS 55% UNDER THE REGION CITY PROPOSAL.
- o REMAINING BRANCH ORGANIZATION WOULD BE SALES/TECHNICAL SERVICE.

11/11/82
DY 1:8:cb

Exhibit "E" - page 1

BSG Senior Staff

D. F. Ryan

MANPOWER PRESENTATION

May 6, 1983

The following manpower review was presented as follows:

April 7 to W. F. Glavin
April 8 to M. E. Antonini
May 6 to D. T. Kearns

RECEIVED
MAY 16 1983
RICHARD A. YORIO

base for your presentations and discussions.

I believe the conclusions from these discussions are based on the assumptions that BSG will change into the Copier and Systems marketing arm of Xerox in the U.S. The primary driver for manpower reductions is as a surrogate for reducing costs. Therefore, the emphasis will continue to be on reducing costs in the mainstream Copier/Systems business structure. This means reductions in the overall overhead structure and support manpower and, therefore, the achievement of financial benchmarks by function.

The consideration of Systems as part of the mainstream business means that Frank Farsace's proposal with regard to capturing administrative headcount in dollars through the merger of IP and C/D administrative organizations is exactly on the right track. Headquarters staffing will only be defensible by use of benchmark comparisons.

The planned progress in National Service to achieve the minimum level of CSR's was conveyed to both Frank Pipp and David Kearns and received with accolades for our success. Both recognize that the ball is now in the SBU's court with regard to future engineering design.

In Administration, David was aware of the Arthur Andersen results and now understands our multifaceted drive through Systems, Customer Service Centers and merging of Headquarters support as the prime drivers toward benchmark objectives. Administrative achievement will continue to be closely watched but there is now proper understanding of the recent report to the Corporate Audit Committee.

Dick!
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THANKS
YOUR
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RRY
5/16

C. Staff.
I echo
Larry's
thanks.
Dick
5/1

BUSINESS SYSTEMS GROUP
1983/1984 OPERATING PLAN
MANPOWER REVIEW

THEMES

- SUBSTANTIAL HEADCOUNT REDUCTIONS TAKEN, ESPECIALLY IN REPROGRAPHICS.

- REPROGRAPHICS ACTIONS REPRESENT 16% HEADCOUNT REDUCTION SINCE 1981; PRODUCTIVITY GREATER THAN THAT LEVEL DUE TO OFFSETTING VOLUME GROWTH.

- ACTIONS TAKEN INCLUDE RHQ RESTRUCTURE, LOW COST HIRES HIRING LIMITATIONS.

- FURTHER PRODUCTIVITY PLANNED FOR 83/84 - ISSUE IS REALISM OF FURTHER TASKS BEYOND THOSE PLANNED.

- OTHER BUSINESS GROWTH MUST BE EVALUATED ON A BUSINESS-BY-BUSINESS BASIS AND APPROPRIATE DECISIONS REACHED.

- FUNCTIONAL HEADCOUNT LEVELS MIRROR OVERALL REDUCTIONS.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

November 19, 1984

REJECTED
BY COMM.
1-3 VOTE
12/4/84

MEMORANDUM

TO : Gwendolyn Young Reams

FROM : Paul D. Brenner

RE : Review of Presentation Memorandum --
New York Daily News

I concur in the recommendation of the New York District Office to litigate this pattern-or-practice ADEA case.

The case involves a collectively bargained "resignation incentive" (or, "buyout") plan. Under that plan, Respondent offered to make special cash payments to compositors and stereotypers who voluntarily resigned, thus relinquishing their contractual guarantees of lifetime employment. The one-shot buyout plan was officially announced on December 30, 1984, and was open only until January 25, 1981 (or, if before that date, 20 compositors and 25 stereotypers signed up). During that period, 13 compositors (9 of whom were age 61 or over) and 8 stereotypers (3 age 61 or over) elected to resign. Those employees received buyout payments on the following scale:

Employee age	Compositor	Stereotyper
65 or over	$ 8,000	$25,500
64	10,000	27,000
63	12,500	30,000
62	15,000	33,000
61	17,000	36,000
60 or under	20,000	40,500

An EEOC-directed investigation simply confirmed what this payment scale already demonstrates: that 9 individuals received the maximum payments for employees age 60 or under, while 12 individuals age 61 or older received payments which were reduced solely on the basis of age. Those 12 individuals received approximately $150,000 less in buy-out payments than their younger colleagues. See Presentation Memorandum, VI.1 at p. 1. At no time during the investigation, or in subsequent conciliation efforts, did Respondent ever claim that those age-based reductions were justified by any age-related cost considerations.

Courts have recently ruled that similar age-based severance benefit plans violate Section 4(a) of the ADEA, and do not fall within the exemption for "employee benefit plans" under Section 4(f)(2) of the ADEA. See EEOC v. Borden's Inc., 724 F. 2d 1390 (9th Cir., 1984); EEOC v. Westinghouse Eletric Corp., 725 F. 2d 211 (3d Cir., 1983), cert. den., 53 U.S.L.W. 3236 (No. 83-1779, Oct. 2, 1984). The only real distinction between the facts of these cases, and the facts of this case, is the voluntary nature of the underlying terminations here. However, as the Supreme Court has already said in the analogous Title VII context: "It is irrelevant that . . . participation in [a benefit] plan is voluntary, [inasmuch as] ~~Title~~ VII forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' [Section 703(a),] not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Arizona Governing Committee v. Norris, ___ U.S. ___, 103 S. Ct. 3497, n. 10 (1983). But see Patterson v. Independent Sch. Dist. #709, 742 F. 2d 465 (8th Cir. 1984), which holds that a voluntary early retirement plan was lawful under the ADEA, but which I firmly believe was incorrectly decided.

In considering this case for litigation, it should be noted that the Commission has already filed suit in a virtually identical case in the same court where this proposed lawsuit would be filed. See EEOC v. Times Mirror, Inc. [publishers of "Newsday"], S.D. N.Y., No. 84-Civ-4692, approved by 3-0 vote of the Commission on June 12, 1984, filed in court on July 5, 1984. It should also be noted that, in this case, it will be necessary to prove that the alleged violations were "willful" in order to fall within the 3-year statute of limitations, plus tolling for conciliation. See Section 7(e)(1) and (2) of the ADEA; see also EEOC v. Colgate-Palmolive Co., 586 F. Supp. 1341, 1343-45 (S.D. N.Y., 1984), on the tolling issue.

The meaning of the term "willful" is now before the Supreme Court in Trans World Airlines v. Thurston, Nos. 83-997 & -1325 (argued Oct. 5, 1984). Under the standard of "knew or should have known that the ADEA was in the picture" (argued by the Solicitor General in his brief for the EEOC, pp. 32-40), there is little doubt that Respondent's actions were willful. However, under the currently controlling Second Circuit standard of "reckless disregard for ... whether its conduct was prohibited by the ADEA" (ALPA v. TWA, 713 F. 2d 940, 956 (2d Cir., 1984), cert. granted, 104 S. Ct. 1412), Respondent's actions would probably not be found "willful." Thus, if an adverse decision is rendered on that issue in the TWA case, it is possible that this case could be dismissed without a decision on the merits. While that possibility might normallly suggest that the Commission should hold this case until the Supreme Court issues a decision, the continued running of the limitations period makes it imperative that suit be filed as soon as possible (preferably before December 30, 1984, but certainly before January 25, 1985).

UNITED STATES GOVERNMENT

memorandum

DATE: November 5, 1984

REPLY TO ATTN OF: Robert L. Williams
Regional Attorney

SUBJECT: Directed v. New York Daily News
Charge No. 021-82-0809

TO: Johnny J. Butler
General Counsel (Acting)

For your consideration, I have enclosed a Presentation Memorandum in the above referenced matter.

Enclosures

RLW/grc

FROM: Robert L. Williams, Regional Attorney
New York Dist. Ofc.

TO: Johnny J. Butler
General Counsel (Acting)

PRESENTATION MEMORANDUM

I. Introductory Information

1. The Statute Involved is ADEA

This is an ELI case.

2. Parties

a. Respondents

New York Daily News

b. Defendants

Same

c. Charging Parties

None. Directed investigation

3. Summary of the Nature and Scope of the the Proposed Suit

This suit challenges the retirement incentive plan of the New York Daily News which was presented to News Stereotypes and ITU Composing Room employees. It discriminated against employees between the ages of 61 and 70 by giving them a lesser retirement benefit than that offered to employees under the age of sixty-one.

4. Case Number and Charge Number

   021-82-0809

5. Location of Facilities

   New York City

6. Size of Workforce

   Approximately 3000 employees

7. SIC Code

8. Nature of Respondent's Business

   Publication and distribution of a daily newspaper.

II. Administrative Record Narrative/ Jurisdiction

1. Summary Case Processing Chronology

   a. Date Charge/Complaint Filed

      No charge filed directed investigation began 1/14/82

   b. Deferral/Referral History

      N/A

   c. Date of Decision or Determination

      February 15, 1983

   d. Date of Notification of Conciliation Failure

      Conciliation has not formerly failed but we anticipate it prior to suit.

   e. EPA Case and ADEA Cases

      The investigation found that the NY Daily News instituted a plan on December 30, 1980 to induce certain employees to retire. The plan discriminated against employees between 61 and 70 by offering them a lesser benefit than that offered to employees under 61.

   f. Jurisdiction

      Jurisdiction is provided under Section 4(a) and 4(b) of the ADEA. With the addition of the one-year tolling period the statute of limitations will run December 30, 1984.

2. Comparative Scope of Decision/ Determination and Suit

   a. The Bases, Issues, and Facilities In the Charge

      Age unequal retirement incentives/ NYC Facility

   b. The Bases, Issues and Facilities unalleged but Determined or Decided as "cause"

None

c. The Bases Issues, and Facilities unalleged but Determined or Decided as "Cause"

None

d. Additional Issues

None

e. Poster - Display Failure

Not covered by the investigation.

III. Other Related Action

1. Contract Compliance Check

N/A

a) Affirmative Action Plans

N/A

2. Other Suits Against Respondent

None

3. Pending Charges

N/A

IV. Proof

1. Factual and Legal Analysis

a. The Violation

The violation here is the use of two retirement incentive plans containing an age based benefit differential in violation of Sec. 4(a)(1) of the ADEA. The plans presented to News Sterotypers and ITU Composing Room Employees by letters dated December 30, 1980, discriminated against employees between the ages of sixty-one (61) and seventy (70) by giving them a lesser retirement benefit than offered to employees under the age of sixty-one(61). (See Exhibit A).
Each plan provided a discriminatory benefit incentive schedule for older retiring employees. The News Stereotypers were offered a schedule of sixty monthly payments. As the age of the employee increased, the payment decreased. Thus, employees age sixty (60) or younger received total payments of $40,500.00 whereas sixty five (65) year-old employees received a total payment of $25,500.00. The ITU Composing Employees who were younger than 61 received a lump sum payment of $20,000 whereas their colleagues over the age of 64 received an $8,000 payment with a sliding scale in between. Under both the Newsstereotyper and ITU plans, the Daily News has discriminated against employees between the age of sixty-one (61) and seventy (70) by offering them a lesser retirement incentive benefit than that offered to employees under the age of sixty-one (61). Arguably the differential between the two plans constitutes a violation.

b. Alleged Defense/Rebuttal

The News defends the buyouts because of their voluntary nature. It is undisputed that the retirements were voluntary. However, in Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris 51 U.S.L.W. 5243 (July 6, 1983) the Supreme Court discussed the irrelevance of a voluntary participation in a discriminatory deferred compensation plan.

> "It is irrelevant that female employees in Manhart were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary. Title VII forbids all discrimination concerning "compensation", terms, conditions or privileges of employment, "not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id at 5245, n. 10 (1983) Thus the fact that the employees opt for the buyout scheme does not excuse its illegality.

As a second defense, the New York Daily News has belatedly raised a good faith defense based on advise provided by Norman Bromberg, Area Director for the Manhattan Wage and Hour Division of the U.S. Department of Labor. The News has failed to establish a good faith defense under Section 10 of the Portal to Portal Act of 1947. See 29 C.F.R. Secs. 790.13-.19 (1983). An employer must prove three elements: (1) reliance on the administrator's ruling, (2) action in conformity with that ruling and (3) good faith action EEOC v. Home Insurance Co., 672 F.2d 252, 263 (2d Cir. 1982). The Bromberg letter sent to a complaining union in a different case. was based on the ruling of the Wage and Hour administrator. Thus, our position is that News' good faith defense lacks merit. Also investigated was the issue of denial of full life and health insurance benefits to older ITU workers choosing the early retirement incentive plan. The employee continued to provide payment for group life insurance and medical insurance premiums until a five year period for employees under the age of sixty. Employees over the age of sixty received the benefit of payment of the premiums with their sixty-fifth birthday. Thus, a fifty-nine year old retiree received five years of benefit coverage, a sixty-two year old received three years of coverage and a sixty-six year old was denied coverage entirely. Denial of full life and health insurance benefits on the basis of age is also a violation of Section 4(a)(1). Employees over the age of sixty (60) are denied equal terms and conditions of employment as their younger counterparts. The News has failed to articulate a nondiscriminatory basis for the denial of benefits to older workers. Back wages due for the denial of the maximum retirement incentive as well as denial of full health and life insurance contributions are estimated not to exceed $150,000.

V. Laches

N/A

VI. Impact

1. Back Pay and Other Relief

The suit seeks the normal injunctive relief liquidated damages and back pay amounting to approximately $150,000

2. Cost of Litigation

This case should be minimal in cost and may be resolved by Summary Judgment.

VII. Jury Trial Demand

1. Section 16(c) has been alleged

2. No jury demand

VIII. Conclusion and Recommendation

It is recommended that this case be approved for litigation.

IX. Signatures

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

ROBERT L. WILLIAMS
Regional Attorney

JAMES L. LEE
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET
NEW YORK, NEW YORK 10007
(212) 264-1972

February 15, 1983

Robert Patterson, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10112

Re: Charge No. 021-82-0609
Respondent: New York Daily News

Letter of Violation

I issue on behalf of the Commission, the following findings as to subject respondent's compliance with the Age Discrimination in Employment Act (ADEA) as amended (copy attached).

The Commission has determined that the above-named respondent has discriminated against the individual named and/or yet to be named in violation of Section 4(a) 1 of the ADEA by offering to employees a retirement incentive program that included age based benefit differentials.

Section 7(b) of the Act requires that before instituting any action, the Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with requirements of the Act through informal methods of conciliation, conference, and persuasion. Section 7(e)(2) of the Act provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with Section 7(b). The period during which the statute of limitations is tolled, as provided in Section 7(e)(2), begins upon issuance of this letter.

It is the policy of the Commission to notify the person(s) aggrieved by the violations which are the subject of this determination of their independent right of action under the

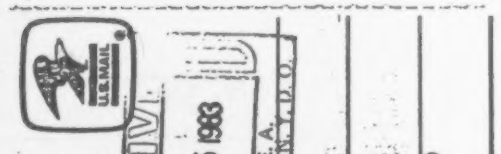
ADEA. However, we plan to withhold such action for at least 10 days in order to provide you with an opportunity to discuss this matter further. A representative of this office will contact you in the near future to arrange a meeting.

On Behalf of the Commission,

Edward Mercado
Edward Mercado
District Director

EM:AS:pr

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: Janice Frazier, Personnel
New York Daily News
220 East 42nd Street
New York, New York



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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION N.Y.D.O.
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90 CHURCH STREET - ROOM 1501
NEW YORK, NEW YORK 10007
(Street or P.O. Box)
t: A. Stathis
(City, State, and ZIP Code)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DRAFT FOR REVIEW ONLY

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

Civil Action No.

v.

COMPLAINT

✓✓ NEW YORK ~~DAILY~~ NEWS, INC.,

Defendant.

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful employment practices on the basis of age and to make whole individuals aggrieved by those unlawful ✓✓ practices ~~listed on Exhibit A annexed hereto~~. The Commission ✓✓ alleges that the Defendant Employer's ~~discriminated against~~ ✓✓ ~~those employees by its~~ Re~~tirement~~signation Incentive Plan of December ✓✓ 30, 1980 unlawfully discriminated in terms of compensation and benefits against employees aged 51 and older, because of their ✓ age ~~(60)~~.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq. (the "ADEA"), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. §216(c) and 277.

✓ 2. The Unlawful employment practices alleged below were and are now being committed within the jurisdiction of the United States District Court for Southern District of New York.

PARTIES

(l.c.) ✓ 3. Plaintiff, Equal Employment Opportunity Commission (the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. §626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978 92 Stat. 3781, and Public Law 98-532 (1984), 98 Stat. 270~~1~~5.

4. At all relevant times, Defendant, New York ~~Daily~~ News, Inc., (the "Employer"), has continuously been and is now doing business in the State of New York and the City of New York and has continuously had and does now at least twenty employees.

5. At all relevant times, Defendant has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 11(b), (g) and (h) of the ADEA, 29 U.S.C. §630(b), (g) and (h).

CONCILIATION

6. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices hereinafter alleged and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. §626(b).

STATEMENT OF CLAIMS

7. Since at least December 30, 1980, the Defendant ~~New York Daily News~~ Employer has engaged in ~~[illegible]~~ unlawful employment practices at its New York City facility in violation of Section 4(a) of the ADEA, 29 U.S.C. §623(a) by implementing ~~[illegible] violations are~~ its December 30, 1980 ~~age based~~ Re~~tirement~~signation Incentive Plan, ~~and its fringe benefit plan~~ which denied full benefits ~~health and life insurance contributions~~ to employees ~~over the~~ age ~~of (60)~~ 61 and older, because of their age.

8. The effect of the practices complained of above has been to willfully deprive the individuals on Exhibit A of equal employment opportunities and otherwise adversely affect their status as employees, because of age.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

A. Grant permanent injunction enjoining the Defendant ~~New York Daily News~~ Employer, its officers, successors, assigns and all persons in active concert or participation with it, from all persons in active concert or participation with it, from engaging in any employment practice which discriminates because of age.

B. Order the Defendant ~~New York Daily News~~ Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals who are at least age 40 but less than 70, and which eradicate the effects of its past and present unlawful employment practices.

C. Grant a judgment requiring the Defendant ~~New York Daily News~~ Employer to pay appropriate back wages and an equal amount as liquidated damages (or, prejudgment interest in lieu thereof), to individuals who were adversely affected by the unlawful practices described above, including but not limited to individuals on Exhibit A.

D. Grant such further relief as the Court deems necessary in the public interest.

E. Award the Commission its costs in this action.

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

JOHNNY J. BUTLER
Acting General Counsel

2401 "E" Street, N.W.,
Washington, D.C. 20507

ROBERT L. WILLIAMS
Regional Attorney

JAMES L. LEE
Senior Trial Attorney

New York District Office
90 Church Street, Room 1301
New York, New York 10007
(212) 264-7188

✓

✓

~~[illegible]~~

~~8~~7. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices hereinafter alleged and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. §626(b).

STATEMENTS OF CLAIMS

9. Since at least January 1, 1980, the Defendant Employer has engaged in and is continuing to engage in unlawful employment practices at its Galesburg facility, in violation of Section 4(a) of the ADEA, 29 U.S.C. §623(a). Defendant Employer has maintained and continues to maintain a "termination ~~pay~~ allowance" policy which denies termination pay to employees 65 years of age ~~and~~ or older~~,~~ and to employees eligible for retirement benefits under a ~~the~~ pension ~~benefits plan~~ plan.

10. The effect of the practices complained of above has been to willfully deprive those individuals named on Exhibit A, attached hereto, and other similarly situated individuals, of equal employment opportunities and otherwise adversely affect their status as employees, because of age.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining the Defendant Employer, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates because of age.

B. Order the Defendant Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals who are at least age 40 but less than age 70, and which eradicate the effects of its past and present unlawful employment practices.

C. Order the Defendant Employer to make whole individuals adversely affected by the unlawful practices described above, by providing appropriate back wages with prejudgement interest, and by providing the affirmative relief necessary to eradicate the effects of its unlawful practices.

D. Grant such further relief as the Court deems necessary and proper in the public interest.

E. Award the Commission its costs in this action.

Respectfully submitted,

JOHNNY J. BUTLER
General Counsel (Acting)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

JOHN P. ROWE
Regional Attorney

RICHARD SUTTER
Supervisory Trial Attorney

CAROL C. MOSCHNDREAS
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Chicago Distict Office
536 South Clark Street, Room 982
Chicago, Illinois 60605
353-7526

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

NOV 27 1984

REJECTED BY
COMMISSION, ON
RECONSIDERATION,
2-2 VOTE —
JAN. 15, 1985

MEMORANDUM

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred W. Alvarez, Commissioner

FROM : Johnny J. Butler,
General Counsel (Acting) JB

RE : Request to Reconsider
OMC - Galesburg

This is to request reconsideration of the Commission's decision, by 2-2 tie vote on November 6, 1984, not to authorize litigation in the above-referenced ADEA case. The litigation recommendation was submitted by the Chicago District Office; and, the Office of General Counsel concurred in part with that recommendation. See Presentation Memorandum, September 28, 1984; OGC recommendation, October 25, 1984; copies attached. For the reasons stated below, the Office of General Counsel continues to recommend litigation limited to Respondent's policy of denying severance benefits to employees age 65 or older, solely because of their age.

The case involves Respondent's contractual policy of denying any "termination allowance" (severance benefits) to employees who, when permanently laid-off, are: (1) "sixty-five years of age or over"; or, (2) "eligible for and elect to take early or advanced retirement . . ." (Article XVIII.G of the collective bargaining agreement, copy attached). Thus, Respondent denies termination allowances to employees under age 65 if--and only if--they are eligible for and voluntarily elect to take immediate retirement when laid off. On the other hand, employees aged 65 or older are denied termination allowances solely because of age, regardless of whether they are eligible for retirement or whether they would voluntarily elect retirement.

Two appellate courts have recently held that an age-based denial of severance benefits is unlawful under the ADEA. See EEOC v. Borden's Inc., 724 F. 2d 1390 (9th Cir., 1984); EEOC v. Westinghouse Eletric Corp., 725 F. 2d 211 (3d Cir., 1983), cert. denied, 105 S.Ct. 63 53 U.S.L.W. 3236 (No. 83-1779, Oct. 2, 1984). As the court noted in Borden's, supra, 724 F. 2d at 1393:

> Borden's severance pay policy denied a benefit to certain employees because they were age 55 or older. The discrimination was intentional in the sense that Borden purposefully drafted its sever-

> ance pay policy to have this effect. We need look no further for the intent necessary to support a finding of age discrimination under the disparate treatment theory.

In this regard, there is only one distinction between the instant case and the Borden's and Westinghouse cases. In those cases, age was only one of two determining factors: the other was retirement eligibility. In the instant case, age of 65 or older is the sole determinant; and thus, a much stronger indicator of Respondent's unlawful age discriminatory intent. Yet, even assuming that all of Respondent's age-65-plus employees were retirement eligibible, the result in this case would be the same. See EEOC v. Curtiss-Wright Corp., 34 EPD ¶34,483 (D. N.J., 1982), where the court held that it was unlawful to deny severance pay to those employees only who were eligible to receive normal (full) retirement benefits at age 65.

Accordingly, the Office of General Counsel once again recommends litigation in this case on behalf of five (or, six) individuals who were denied $37,993 in termination allowances, solely because they were age 65 or older at the time of their termination. See PM, VI.A at page 15. In recommending litigation, OGC recognizes that there is an arguably adverse decision on a related severance pay issue in the circuit where this proposed suit would be filed. See Parker v. Federal National Mortgage Ass'n, 731 F. 2d 975 (7th Cir., 1984). However, OGC not only believes that the Parker case is easily distinguishable from the instant case, but also believes that the rationale of the Parker decision will result in a favorable decision for the Commission in the instant case. See OGC staff review memoranda: Asst. G.C. Vella Fink, October 22, 1982, at page 1; Senior Trial Atty. Paul Brenner, October 12, 1982, at page 2.

In the Parker case, supra, the Seventh Circuit ruled that it was lawful to deny severance benefits to a laid-off employee who had the option to take either severance or retirement benefits, and who voluntarily elected to take retirement. 741 F. 2d at 981. The Seventh Circuit then distinguished EEOC v. Borden's, supra, on the ground that "the Ninth Circuit held that older employees who had no choice but to give up severance pay had a valid claim under the ADEA." Ibid. Thus, under the rationale of the Seventh Circuit decision, Respondent in this case violated the ADEA by giving retirement-eligible employees under age 65 the option of receiving either termination allowances or immediate retirement benefits, while denying that same option to employees age 65 or older. To say the least, therefore, Respondent's policy presents a very clear instance of disparate treatment solely on the basis of age.

(8)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

NOV 21 1984

M E M O R A N D U M

REJECTED
BY COMM. 1-3
12/4/84

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred W. Alvarez, Commissioner

THRU : Johnny J. Butler
General Counsel (Acting) JB

FROM : Paul D. Brenner, Paul Brenner
Senior Trial Attorney

RE : Litigation Recommendation --
New York Daily News

The Office of General Counsel concurs in the recommendation of the New York District Office to litigate this ADEA case.

The case involves a collectively bargained "resignation incentive" (or, "buyout") plan. Under that plan, Respondent offered to make special cash payments to compositors and stereotypers who voluntarily resigned, thus relinquishing their contractual guarantees of lifetime employment. The one-shot buyout plan was officially announced on December 30, 1980, and was open only until January 25, 1981 (or, if before that date, 20 compositors and 25 stereotypers signed up). During that period, 13 compositors (9 of whom were age 61 or over) and 8 stereotypers (3 age 61 or over) elected to resign. Those employees received buyout payments on the following scale:

Employee age	Compositor	Stereotyper
65 or over	$ 8,000	$25,500
64	10,000	27,000
63	12,500	30,000
62	15,000	33,000
61	17,000	36,000
60 or under	20,000	40,500

An EEOC-directed investigation simply confirmed what this payment scale already demonstrates: that 9 individuals received the maximum payments for employees age 60 or under, while 12 individuals age 61 or older received payments which were reduced solely on the basis of age. Those 12 individuals received approximately $150,000 less in buy-out payments than their younger colleagues. See Presentation Memorandum, VI.1 at p. 1. At no time during the investigation, or in subsequent conciliation efforts, did Respondent ever claim that those age-based reductions were justified by any age-related cost considerations.

Courts have recently ruled that similar age-based severance benefit plans violate Section 4(a) of the ADEA, and do not fall within the exemption for "employee benefit plans" under Section 4(f)(2) of the ADEA. See EEOC v. Borden's Inc., 724 F. 2d 1390 (9th Cir., 1984); EEOC v. Westinghouse Eletric Corp., 725 F. 2d 211 (3d Cir., 1983), cert. den., 53 U.S.L.W. 3236 (No. 83-1779, Oct. 2, 1984). The only real distinction between the facts of those cases, and the facts of this case, is the voluntary nature of the underlying terminations here. However, as the Supreme Court has already said in the analogous Title VII context: "It is irrelevant that . . . participation in [a benefit] plan is voluntary, [inasmuch as] Title VII forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' [Section 703(a),] not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Arizona Governing Committee v. Norris, 463 U.S. 1073, 103 S. Ct. 3497, n. 10 (1983). But see Patterson v. Independent School District #709, 742 F. 2d 465 (8th Cir., 1984), which held that a voluntary early retirement plan is lawful under the ADEA, but which OGC believes was incorrectly decided for several reasons.

n. 10 at 1081-82

In considering this case for litigation, it should be noted that the Commission has already filed suit in a virtually identical case, in the same court where this proposed lawsuit would be filed. See EEOC v. Times Mirror, Inc. [publishers of "Newsday"], S.D. N.Y., No. 84-Civ-4692, approved by 3-0 vote of the Commission on June 12, 1984, filed in court on July 5, 1984. It should also be noted that, in this case, it will be necessary to prove that the alleged violations were "willful" in order to fall within the 3-year statute of limitations, plus tolling for conciliation. See Section 7(e)(1) and (2) of the ADEA.

The meaning of the term "willful" is now before the Supreme Court in Trans World Airlines v. Thurston, Nos. 83-997 & -1325 (argued Oct. 5, 1984). Under the standard of "knew or should have known that the ADEA was in the picture" (argued by the Solicitor General in his brief for the EEOC, pp. 32-40), there is little doubt that Respondent's actions were willful. However, under the currently controlling Second Circuit standard of "reckless disregard for . . . whether its conduct was prohibited by the ADEA" (ALPA v. TWA, 713 F. 2d 940, 956 (2d Cir., 1984), cert. granted sub nom. TWA v. Thurston, 104 S. Ct. 1412), Respondent's actions would probably not be found "willful." Thus, if an adverse decision is rendered on that issue in the TWA case, supra, it is possible that this case could be dismissed without any decision on the merits. While that possibility might normallly suggest that the Commission should hold this case until the Supreme Court issues a decision, the continued running of the limitations period makes it imperative that suit be filed as soon as possible (preferably before December 30, 1984, but no later than January 24, 1985).

Finally, because of the potential limitations problem, conciliation has not yet been formally "failed" in this case. See P.M., II.1.d at pages 2-3. By keeping the conciliation process open until just before the proposed lawsuit is filed, the Commission assures that the statute of limiations will be tolled for the maximum period of one year. See EEOC v. Colgate-Palmolive Co., 586 F. Supp. 1341, 1343-45 (S.D. N.Y., 1984), on the tolling issue.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 28, 1985

MEMORANDUM

TO : Leroy T. Jenkins, Jr.
Director
Legal Enforcement & Coordination Division

THRU : Estelle D. Franklin
Supervisory Trial Attorney
Legal Enforcement & Coordination Division

FROM : Carlton L. Preston
Senior Trial Attorney
Legal Enforcement & Coordination Division

Judith L. Mathis
Equal Opportunity Specialist
Legal Enforcement & Coordination Division

SUBJECT : Update on Status of EEOC v. Xerox
Investigation/Conciliation

This memorandum is written in response to your request for an update status report of the Xerox investigation/conciliation. This memorandum includes (a) the list of potential classmembers we have contacted for possible evaluation and our concerns about the possible disadvantage of the Commission conciliating their claims (b) the contract proposal package for additional statistical analysis and (c) our comments about your concerns of the ability of the additional analyses to further develop this case.

Enclosed herewith as attachment one is the list of the classmembers we have contacted. All of these former employees have attempted to opt into the Lusardi v. Xerox litigation.1/ Most of their allegations that Xerox discriminated against them are after the March 31, 1983 deadline certified by the Court in the Lusardi litigation. We obtained these names, addresses and telephone numbers and the permission to contact them from the Lusardi attorneys on certain expressed and implied conditions that the Commission would join their litigation. In their letter forwarding us the names they specifically requested that we not disclose any information that we obtain from the classmembers to Xerox without prior approval from class counsel. Notwithstanding that request, it was my understanding at our January 25, 1985 meeting that for the purposes of conciliation we are to recontact the classmembers and request that they choose between reinstatement to their former jobs or to waive the right to reinstatement. I was not present at the last conciliation meeting, therefore I assume that Xerox has offered them this option.

If my understanding is correct I have some concerns about the Commission making that offer. First, these classmembers have attempted to opt into the Lusardi lawsuit pursuant to the class certification provision of the ADEA. As such they are the clients of the attorneys representing the Lusardi classmembers. Each signed a consent form specifically authorizing these attorneys to act in their behalf. None of the classmembers that we have contacted have requested that the Commission represent them nor have we offered our legal representation in the 7(b) conciliation. Second, I think that we have a professional responsibility to inform the Lusardi attorneys of Xerox's offer and request their concurrence before we make any conciliation offers to their clients that may result in a waiver of possible relief. Finally, the private attorneys have informed us on several occasions lately that if the Commission is not going to enter this litigation, they are prepared to file a motion requesting an extension of the March 31, 1983 cut-off date, so they can include the classmembers

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1/ We have, in addition, interviewed approximately 70 people who have already opted into the Lusardi suit. They are not discussed in this memorandum.

whose names they forwarded to us. Also, we have been told if the Commission is not coming into this litigation, they are going to associate with an additional law firm to assist in the litigation.

I think that it is imperative that the Commission make a determination whether we will or will not represent the classmembers whose cause of action arose after the Lusardi cut off date in conciliation and whether we are going to get involved in this litigation. After we have made our decision I think we should meet with the Lusardi attorneys and make our decision known.

The disadvantages in the Commission's conciliation of a small number of claims in Lusardi litigation are as follows: T - time period in which back pay calculations would be made is from March 31, 1983. Almost all of the classmembers were terminated with some type of pay continuance ranging from two weeks to 30 months. Theoretically some of the classmembers may not be entitled to any back pay. There is a probability with the pay continuance and other mitigating factors that any back pay this group would be entitled to would be low. The greatest harm suffered by most of these people is the reduction in retirement benefits. Since Xerox's potential liability on that issue in the lawsuit is enormous, it is unlikely they would in conciliation give any adjustment in retirement benefits. We think the Commission's conciliating these few claims for nuisance value relief would have a negative impact on the Lusardi litigation, which is currently in the initial discovery stages. Unless a settlement resulted in full relief for these people, our action could limit their recovery to an amount much smaller than their potential recovery from the Lusardi suit.

We have been unsuccessful in finding former employees who believe they were discriminated against by Xerox but who have not joined or attempted to join the Lusardi suit. Xerox has declined to furnish names of those who were "Voluntarily" RIF'd. For us to develop names of those people would be impossible with the information we have about them which only identifies them by Social Security number and employee number. Therefore the group of people we would represent in conciliation or litigation now numbers about 100. An option that we consider to be viable is to find that conciliation has failed, if Xerox is unwilling to offer something close to full relief, and to assert that the private, on-going litigation appears to be accomplishing the purposes of the ADEA by effectively litigating the allegations of age discrimination.

If the Commission is to further develop and refine the evidence of age discrimination by Xerox, we need to contract for additional work by our expert, Dr. Reisler. Enclosed as attachment two is the complete contract package for the additional statistical analysis including justification for a sole source contract and a Statement of Work. We think that the additional analyses are necessary because approximately seven months after Xerox represented to the Commission that they had given us all of the computer tapes and the applicable codes pursuant to our Request for Information, on October 12, 1984 we were given our third set of tapes. After an extensive review and analysis our expert, Dr. Reisler, informed us that the last group of tapes complied with our initial request. However, they are extensive and containing 76,000 files which makes it expensive to work with. Dr. Reisler has been able to sort out the tapes into a workable data base with the money available from our last contract. Funding was not sufficient to perform analyses or make conclusions about the data.

This analysis using Xerox's last data base submissions would allow us to break out the different age bands of the protected age group by location and job positions. Prior data submissions did not allow us to refine our analysis in this manner. It is important to perform this type of analysis because the Xerox expert's report aggregated all of the employees under 40 and compared them with the employees over 40. That type of analysis has the tendency to mask many specific areas of discrimination; because of the size of the group, it tends to swamp any meaningful statistics about part of the group. However, the proposed additional analysis would isolate specifics in areas where we think Xerox's liability will be exposed.

ATTACHMENT 1

Albertson, William R.
3414 Silver Maple Drive
Danville, California 94526

Baffa, Joseph J.
1014 Dawnview Street
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Ball, Andrew T.
11 Pleasant Avenue
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Bovitz, James L.
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Arcadia, California 91006

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Weinman, Martin H.
14483 E. Arizona
Aurora, Colorado 80012

Wolfertz, Fred
P.O. Box 338
Hope, New Jersey 07844

Zielinski, Joseph
152 Country Manor Way #2
Webster, New York 14580

SUPPLIES/EQUIPMENT/SERVICES REQUISITION

REQ NO.

APPROPRIATION CODE

REQUESTING OFFICE: OSP/LEC

INSTRUCTIONS. *Administrative Officer's will date/sign request if it is to be forwarded [illegible]quarters, EEOC.*

SUGGESTED VENDOR: DBS Corporation*

TO: Contracts and Procurement

DELIVER TO:
Judy Mathis
Room 444, LEC

ITEM NO.	DESCRIPTION OF SUPPLIES, MATERIAL OR SERVICE REQUIRED	QUANTITY	UNIT OF ISSUE	ESTIMATED COST
	Computer services and statistical analyses of data in EEOC v. Xerox			$24,900
	DBS Corporation 6201 Leesburg Pike, Suite 220 Falls Church, Va. 22044 534-0640			
			TOTAL	$24,900

JUSTIFICATION/REMARKS *(State if inside delivery or if prior notification is necessary)*

See attached Statement of Work

*See attached statement justifying sole source contract procedure

DATE — TYPED NAME/SIGNATURE OF REQUESTING OFFICIAL: Leroy T. Jenkins, Jr. Director, LEC

DATE — TYPED NAME/SIGNATURE OF APPROVING OFFICIAL: James N. Finney, Director, Systemic Programs

DATE — TYPED NAME/SIGNATURE OF ADMINISTRATIVE OFFICER: Mary Pfeiffer, Admin. Officer, GC

EEOC FORM JUN 76 123 PREVIOUS EDITIONS OF THIS FORM MAY BE USED GPO 867-443

ATTACHMENT 2A

JUSTIFICATION FOR CONTRACTING WITH DBS CORPORATION

The computerized statistical analyses and evaluations of possible age discrimination which are requested will come from the third set of computer tapes provided by Xerox. Throughout the investigation, DBS Corporation has assisted us in the analysis of data contained on tapes and in meeting with company officials. These meetings have included highly technical discussions of the Xerox employee data system and of the finding in our analyses. In addition, one of the tasks necessary to our investigation, as noted in the statement of work, is a comparison of data on the current tapes with the data and results of earlier tapes.

DBS Corporation is the only contractor which could efficiently and promptly perform this work. Staff members in that company have developed considerable expertise in processing and understanding an intricate employment computer system. The work requested builds on what has been learned in work previously performed. To change contractors would be extremely disruptive to the conciliation process and would create much more expense in duplicating development of expertise which DBS has already achieved.

ATTACHMENT 2B

STATEMENT OF WORK TO BE PERFORMED

The contractors shall develop analyses of the data contained on computer tapes received from Xerox including examination of hiring rates, termination rates, workforce compositions, various functional groupings and comparisons across the years. Specific tasks to be performed by the contractor in producing these analyses are:

A. resolve potential data problems associated with codes, omission, reconciling the changes and reorganizations during the relevant period;

B. process the tapes and produce tabulations which include statistical measures and analytical formulations and which evaluate possible age discrimination by Xerox;

C. compare the results obtained from the data on this most current set of tapes with the results from the previous set of tapes to explain apparent differences;

D. produce graphical displays which synthesize the numbers into a context which permits comparisons and which allows the expert to draw inferences as to possible age discrimination by Xerox.

To Leroy 8/10/84
(to be used in answering
questions from Matthews
re: Xerox Investigation

EVIDENCE OBTAINED AND ANALYZED PRIOR TO LOV

From Charge Files: In response to requests from district offices and 706 agencies during investigations of charges of original named P's, Xerox submitted information regarding OPD in the N.E. Region. This info included stack ranks of sales reps, performance evaluations of CP's, company policy regarding mandatory steps necessary to terminate any employee with more than 8 years service. (VP of Personnel to make the decisions after several levels of review below). CP's also submitted stack ranks for national OPD sales, gave statements that they had been assigned less desirable territories and that they had been replaced by younger employees. CP's submitted ads which appeared in NYT around time of their terminations and which solicited applicants for OPD sales reps positions.

EVIDENCE SHOWED.

Company policy as to termination procedure wasn't followed; nobody with higher authority really reviewed term. file

Many younger employees with fewer sales were retained while CP's were terminated

CP's all had history of high sales and successful careers with Xerox; good perf. evaluations

Interviews with charging parties and Lusardi plaintiffs: Approx. 25 interviews of former sales reps, engineer, personnel and audit executives. All gave statements which show a pattern: all were either called in suddenly and told they were terminated effective immediately or were told by their supervisor that if they did not voluntarily resign or retire that they would be fired. Those who left "voluntarily" felt they could work a better deal, particularly in keeping health insurance benefits, if they left that way. All stated that they were qualified for other jobs in the company, but they were given no information about other open jobs and they were given no opportunity to transfer. All stated that according to the Xerox matrix of characteristics which are supposed to be the objective criteria upon which the termination decision is made (years of service, potential, level of performance) there were others within their departments who should have been terminated before them. Those who challenged their supervisors about that never got any satisfactory explanation.

The former Human Resources Manager (personnel, in Xerox speak) stated that he was instructed to hire as many new college grads as sales reps in January and February, 1982 as were terminated in late 1981. (when the original named P's got it) He was told this was a financial decision and not in his field. Because he had worked in Versatec before going to OPD, he found his own job in Versatec after being RIF'd. When the papers went up to Xerox corp. HQ, the decision to hire him at Versatec was vetoed. This witness said that younger employees in OPD were given the opportunity to transfer to other divisions or groups, while older employees were just terminated. High level Xerox managers have a current computerized list of all open jobs within the corporation, but this list is not available to employees. The only way an employee learns of an opening elsewhere is from his manager or through a friend in the company. This CP says that potential was interpreted by Xerox as a negative--the greater the years of service and the older the employee, the less potential he has. Others agreed with this.

Information given us by private p's attorneys: some they got thru discovery, some was submitted by former employees. Photocopy of printouts showing all terminations and hires of salaried employees by Xerox between 1980 and 1983, copies of memos circulated by Xerox executives, copies of newspaper ads soliciting applicants. statements by employees alleging corporate directed policy of getting rid of senior, highly paid professionals

EVIDENCE SHOWS.

During the period Xerox hired more salaried employees than were terminated. (this total includes, however, employees in addition to professional and sales) Xerox reason for terminations, necessary reduction in force, is at least in part pretextual as many were being replaced. Analysis of specific departments showed that up to 87% of the terminees were over 40 (make-up of departments by age unknown exactly; interviewees said at highest Xerox workers over age 40 account for one third of workforce-this was later confirmed after LOV by Xerox tapes which show 35% over 40)

EVIDENCE OBTAINED AND ANALYZED SUBSEQUENT TO ISSUANCE OF LOV

Personnel Files of Charging Parties: Partial analysis of these files confirms oral statements by charging parties already interviewed that their performance records were good or very good prior to their sudden terminations. Files of persons not yet interviewed also show a history of success with the company and of high performance. The files contain no evidence, so far discovered, of any high level review of the termination decision, as required by Xerox policy.

Copies of Xerox Personnel Manuals: The manuals set out, for each major group and division, company policy as to termination procedures, the matrix of criteria upon which employees are to be selected for termination, the criteria for retirement eligibility, and the type of benefits for which employees are eligible. The manuals describe the Bridge to Retirement Program, initiated by Xerox in 1981, which was made available to employees 51 1/2 and stretches their severance to cover them up to the age when they are eligible for retirement benefits. For most employees that age is 55.

Interviews with Charging Parties/Lusardi Plaintiffs: These interviews have provided confirmation of many initial interview allegations, and have been more of the same. Because so many former employees, from around the country and from different jobs and different divisions, say much the same things about the circumstances of their terminations or retirements, the evidence of a pattern and of a deliberate, corporate directed policy grows stronger.

A new and interesting allegation which has recently surfaced is that the Bridge to Retirement Program, presented by Xerox as a benefit to those close to retirement age, was actually a way to target older employees for elimination. Several former employees say that in previous Xerox reductions in force, voluntary termination packages were offered across the board to all employees in an effort to encourage attrition and reduce personnel. This period saw no such general offer to all employees. Only the Bridge to Retirement Plan, for which the minimum age is 51 1/2, was offered as a general inducement to attrition. Speculation is that Xerox felt that because such large reductions were necessary that if a general inducement were offered, the younger employees who could most easily have gotten other jobs would have left All retirees interviewed so far have said that they only took the retirement package to avoid being fired and getting even less. To prove this allegation we need to develop more evidence and verify in discovery that other reductions in force prompted general voluntary termination package offers.

Computer Tapes: The difficulties with reading the tapes and drawing meaningful data from them have been extensively documented elsewhere. Because Xerox has represented that these tapes will vindicate its assertions that it has not discriminated on the basis of age, we have taken the deliberate attempts to mislead us and the false statements as to the documentation provided to be evidence of lack of good faith in conciliation negotiations.

Our computer experts have been able to pull data off these tapes which show, they assert, a statistically disproportionate pattern of employment actions based apparently on age. They are now in the middle of several analyses which they characterize as promising. The plan is for Dr. Reisler to present the results and explanations of the analyses to Xerox during our next conciliation meeting.

Xerox Records of Advertising Seeking Job Applicants: These records confirm and add to the initial statements of charging parties that Xerox was advertising for applicants for the jobs from which they were being terminated. These records show that OPD was advertising in major newspapers around the country, throughout the period of greatest terminations, for engineers, sales reps, systems analysts, marketing managers and other positions. All of the ad records have not yet been analyzed, but we know at least that many of those who were fired or forced to retire could have been transferred to open jobs elsewhere, as provided in Xerox official policy. An interesting statement in many of the ads is that applicants "with up to 4 years experience" are sought. (emphasis added)

Outside Research: Research of labor market statistics by age, by occupation is underway. In addition, we are researching general market factors and data about the industries with which Xerox is concerned are being gathered.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

April 18, 198~~4~~5

MEMORANDUM

TO : James N. Finney
Director
Systemic Programs

THRU : Leroy T. Jenkins, Jr.
Director
Legal Enforcement and Coordination Division

Estelle D. Franklin
Supervisory Trial Attorney
Legal Enforcement and Coordination Division

FROM : Carlton L. Preston
Senior Trial Attorney
Legal Enforcement and Coordination Division

Judith L. Mathis
Equal Employment Specialist
Legal Enforcement and Coordination Division

SUBJECT : Recommendation on Disposition of *EEOC* v. *Xerox*
ADEA Investigation/Conciliation

On April 19, 1984, the EEOC issued a letter of violation pursuant to the ADEA against the Xerox Corporation. Under the ADEA, this letter tolls the statute of limitations for up to one year. Since that period will soon expire, this memorandum will present our recommendation for what should occur at that time.

HISTORY

The EEOC first became involved in investigating Xerox for ADEA violations in August, 1983. During our monitoring of nationwide discrimination lawsuits for the intervention project, the Legal Enforcement Division became aware of a pending lawsuit alleging age discrimination by Xerox. *Lusardi, et al.* v. *Xerox*, C.A. 83-809 (D.N.J.). Our initial efforts were directed towards an intervention. We met with the *Lusardi* attorneys and discussed the possibility of the Commission becoming involved in their lawsuit through intervention or direct lawsuit. They welcomed our participation and agreed to share discovery information they had obtained if it was not covered by a protective order.

A presentation memorandum to intervene in the *Lusardi* litigation was prepared and sent to the Commission for litigation authorization review. However, the case was never fully presented to the Commission; prior to the date it was to be presented, Commissioner Webb raised questions in regard to a lack of data he deemed necessary to support Commission litigation.[1] We subsequently decided to withdraw the presentation memorandum until the data could be supplemented.

After considering the merits of intervening in the Lusardi litigation, we decided, that proceeding with our own investigation and filing a direct lawsuit would be a more desirable course to follow. On February 7, 1984, a letter was sent to Douglas M. Reid, Vice President for Personnel of the Xerox Corporation announcing that the Commission was initiating an investigation to determine whether there was reasonable basis to believe that the ADEA had been violated. (See Exhibit A)

Throughout this investigation, Xerox has been recalcitrant. In our initial letter to Xerox on February 7, 1984, we included a request for information. The request asked for computer files and applicable code documents of Xerox personnel employment data. We also requested that at our first meeting they bring one of their computer people who was familiar with their employee personnel data system.

Prior to the meeting we verified our request in a telephone conversation between Judy Mathis, Carlton L. Preston and Phil Smith, Associate General Counsel for Xerox. Mr. Smith specifically agreed to bring their computer person and code documentations to the March 13, 1984 meeting. However, when the meeting was held he produced neither the computer person nor the code documents. Mr. Smith stated he was unavailable and promised that the documentation would be included with the forthcoming tapes.

The first meeting was held as scheduled on March 13, 1984. The Commission was represented by Estelle Franklin, Judy Mathis, Richard Meyerson and Carlton L. Preston. Xerox was represented by Phil Smith and Bob Landsmann. This meeting was requested by Xerox so that we could develop an orderly approach for the production of our request for information. The Commission informed the Xerox officials that our information and analysis indicated that the Xerox Corporation was in violation of the ADEA on a systemwide basis. They denied any violation of the ADEA and assured us that when we reviewed and analyzed the forthcoming data they were to provide us, Xerox would be exonorated.

We concluded the meeting by agreeing to or considering the following: (1) The Commission agreed to delete from our information request any personnel files that Xerox had produced at any Commission field office, to cut the expense of duplication; (2)to accept all non-computerized data as it because available rather than waiting until the entire request was completed; (3) consider confining our initial computer data request to include data which will be compiled from the Personnel Data System (PDS) which included 85% of the salaried employees; (4) delete from our initial request for computer data, information regarding the foreign subsidiaries Fuji Xerox and Rank Xerox Limited; (5) consider a compromise as to the specific salaries we have requested and decided the persons to whom we would allow exclusive access to this data; (6) consider eliminating our request for 1980 data and; (7) consider the terms of a Xerox proposed agreement of confidentialty.

Subsequent to the March 13th meeting, the Commission acted on the matters we had under consideration. We agreed to accept the PDS personel data for the salaried employees and to accept the personnel identification numbers in place of actual employee names, because we were told that it would expedite the delivery of the computer tapes. Our acceptance of the id numbers was temporary and that we were to receive the names at a later date.

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[1] This is a frequent problem in interventions. A not uncommon pattern is that the suit has been initiated by private parties prior to completion of the Commission's investigation; if intervention is sought early in the case (as it should be in order to be timely) only limited discovery has taken place. Additionally, such discovery is frequently subject to a protective order.

The presentation memorandum was prepared and presented based on limited data in our possession and other anticipated evidence to be obtained from future statistical analyses and documentary evidence from the Lusardi attorneys.

Notwithstanding the fact that we agreed to alter our initial request to accept the PDS computer data, to expedite the process, Xerox did not competely comply with our information request until six months later. We agreed to accept the salary records of those employees under salary grade 19. Again we accepted a partial compliance with our request for all salaried employees because we were told it would assist in expediting the data. We did not agree to exclude the 1980 data request because we believed that the 1980 data was relevant to the RIF period that was under investigation. We rejected Xerox's proposed protective order because we thought it would be contrary to Commission policy and could possibly set an unwarranted precedent for all Commission offices receiving data from respondents in the investigative stages. Moreover, it was unclear as to who would determine if a breach occurred and what, if any, remedy would be appropriate.

The Xerox representatives agreed to the following:(1) provide during the week of March 16, 1984 the PDS and payroll tapes and code documentation for each applicable year through 1983 and inform us how long the remaining data request would take to produce. 2/ (2) Xerox was to consider agreeing to toll the running of the statute of limitation during our investigation (3) they were to include the performance evaluations of the terminated employees and all training data that was computerized; (4) Xerox agreed to comply with numbers 8 through 18 of the February 7 request for information within 60 days.

Xerox was prompt in its consideration of the proposed agreements of the March 13 meeting with the exception of most important request, the computer tapes documentation. They delivered within 60 days reqeust numbers 8 through 18. We were informed that training information was not computerized but performance evaluations were and would be included in the forthcoming tapes. They informed us that they would not agree to tolling of the statute of limitation without explaination.

Xerox delivered the first of three submissions of computer tapes during the week of March 16, 1984 as promised. They explicitly stated that had they fully complied with our February 7, request, including the applicable code documentation. However, the code documentation was not included.
It was six months later, two subsequent submissions of tapes, numerous telephone conversations, correspondence and a trip to Xerox Headquarters in Connecticut to talk to their computer expert before they acutally complied with the request for the computer data. Absent full compliance to our request, we could not fully manipulate the data we had received and could only perform general statistical analyses.

The initial statistical analysis showed that a disappropriate number of employees over forty years of age were terminated pursuant to a Reduction-in-Force (RIF). 3/ Xerox terminated approximately 6000 employees over the age of forty during these RIF periods. Their response was that those terminations were "voluntary" and were a part of its voluntary RIF (VRIF) program. However, our interviews with various riffed employees indicated that the so called voluntary RIFs were not in fact "voluntary". Some indicated that they were told that their future at Xerox was not good; others felt that the policies had a coercive effect. For example, Xerox had a policy to give some type of pay continuance, to its riffed employees for periods lasting from two weeks up to thirty months. But, with each succeeding reduction-in-force, 1980, 1981,1982 and 1983,the amount of pay continuance was shortened. The "voluntary" terminated employees told us that when they were given an offer to leave voluntarily with a specific amount of time with pay continuance, they accepted the offer because of the uncertainty of how long the pay continuance would be in the next round of terminations.

2/ Mr. Smith indicated that our original request for computer information would take twenty seven weeks to fully respond.

3/ Because Xerox did not send the requested code documentation with the tapes, our experts was only able to do a very basic analysis of the percentage of RIF'd employees in 5 year age bands of employees from 40 through 65 and over.

The Lusardi attorneys,also were very helpful during the initial investigation period. The were very cooperative in sharing their evidence with the Commission. We received copies of confidential memoranda written by Xerox officials demonstrating that there was an official plan to get rid of the older higher paid employees and hire younger, lower salaried recent college graduates.

In mid-April, 1984, Xerox submitted a second set of computer tapes with some documentation for interpretation. However, because of the time lapse in submitting this data, and because the evidence previously gathered and analyzed clearly indicated an ADEA violation, we decided to issue a Letter of Violation without considering the second tapes.

The issuance of the Letter of Violation was based on our analysis of this case as reflected in the memorandum to Mr. Finney, dated April 16, 1984. In that memorandum we identified the issues we indended to investigate. The issues were termination, hiring promotion transfer and wages. We defined the potential group size, affected positions and the geographic locations that we intended to concentrate our efforts. In support of our analysis we included documentary, testimonial and statistical evidence that was available at that time. (See Exhibit B)

Thus, based on our interviews with the individual victims, the existence of the documents indicating Xerox's policy to terminate older employees under a RIF while hiring younger employees, and our statistical analysis of the employment data we received, a Letter of Violation was issued on April 19, 1984. That letter stated that Xerox had discriminated against salaried employees over forty selecting them for termination based on age. The effect of the issuance of the Letter of Violation was to toll the running of the statute of limitations and begin a period of conciliation for up to one year.

STATUS OF CONCILIATION

Our conciliation plan was to quickly get an analysis of the latest computer tapes and prepare for the first meeting. However, we were unable to get a quick analysis. Although we turned the tapes over to Program Research, they were unable to determine whether all the codes necessary to interpret the data were included on the tapes as Xerox had asserted. Therefore, we were unable to inform Xerox specifically whether we needed additional data or additional code documentation to interpret the existing data. The inability to get this information impacted on our first conciliation meeting.

Another matter which has impacted our conciliation efforts is the Lusardi lawsuit. Thus, before discussing concilation, it is necessary to review the interim action in the Lusardi case.

Between the time we withdrew our request for authorization to intervene and May 23, 1984, the date of the first conciliation meeting, the Court in Lusardi authorized notice to be sent to all present Xerox employees and to former employees who were terminated between March 1980 and March 31, 1983. This notice gave them a chance to join the suit. (Unlike Title VII, individuals other than the named plaintiff are not covered by a lawsuit unless they specifically opt-in). The cut-off date for these persons to file the necessary papers to opt-in was May 9, 1984. By May 23rd, approximately 1300 persons had sought to opt-in to the Lusardi lawsuit.

Subsequently, we received from the Lusardi attorneys a list of seventy persons out of the 1300 who had attempted to opt into the Lusardi class but are not currently included because (1) the claimed discrimination occurred after March 31, 1983, the Lusardi cutoff date, and, thus, is beyond the scope of the Lusardi class, or (2) their claim was filed after the May 9, 1984, the deadline for filing claims. However, all of these people have signed forms retaining Lusardi attorneys as their lawyers and in his letter transmitting the names Attorney Adler specifically states that we should not disclose any information that we have obtained from the potential class members to Xerox without prior approval from class Counsel. (See Exhibit C)

THE FIRST MEETING

Pursuant to § 7(b) of the ADEA we met with the Xerox officials on May 23, 1984, for our first conciliation meeting. The Commission representatives were Estelle Franklin, Judy Mathis, Richard Meyerson and Carlton L. Preston. The Xerox representatives were Phil Smith, Steve McGrath, Charles Gilliam and Bob Landesman. Our position was that the evidence we had gave us reason to conclude that, at least since 1980, there had been a deliberate effort by Xerox systemwide to terminate the over 40 year old higher paid professional employees. This effort was either directed by or condoned by high level Xerox management. We disagreed with their business necessity defense for the termination of those over 40 employees, and that we believed it was a pretext for the actual discrimination. We cited many occasions where Xerox was in violation of its personnel policies and procedures which provide levels of decisions of review necessary to terminate an employee. We assured Xerox that it may respond to our specific charges and may express its general views concerning the disputed action. We also informed them that the Commission may decide to file a lawsuit should conciliation fail and that terminated employees may potentially recover backpay from Xerox.

Xerox denied that it was in violation of the ADEA. They said that if a disproportionate number of older employees were riffed it was not discrimination because most of the terminated employees voluntarily chose to leave the company. We informed them of the testimony of terminated employees that stated they had a choice between firing or taking a voluntary termination. Xerox response was that our witnesses were a minority of disgruntled employees and did not represent what actually happened or the views of the majority of the former employees. Nevertheless, they put great emphasis on the fact that wanted the Commission to narrow our investigation to the former employees that were not in the Lusardi lawsuit.

Our position was that we represented the public interest, and as such, could obtain relief for all victims, including those seeking relief through the Lusardi suit. Xerox's position was that the EEOC could represent only those person who had not opted into the Lusardi lawsuit. Its further position was that no person who had received notice but did not opt in was entitled to relief. Xerox also wanted to know whether our finding of discrimination was limited to any particular departments, but we declined to limit our findings pending further analysis of information. 4/ The meeting closed with our agreeing that a second meeting would be scheduled shortly after completion of the analysis of the second set of tapes.

Also in this meeting we discussed the tapes and the missing documentation. They assured us that the second set of tapes delivered to us a few days prior to the meeting were complete with documentation and that it would vindicate Xerox's position that they did not violate the ADEA in its employment decisions.

After the first meeting, we continued our efforts to analyze the second set of tapes. For approximately two months our computer staff in the Office of Program Research was in contact with Xerox's computer staff without measurable results. Even utilizing the accompanying documentation, we were not getting satisfactory action in Program Rearch. We ultimately hired an outside expert. 5/

On July 20, 1984, after numerous exchanges of correspondence and telephone conversations, Xerox finally produced Tom Stone, its computer employee, who created the computer tapes. After talking to Mr. Stone we learned for the first time that the documentation we received with the tapes was meaningless in interpreting the personnel data in our Request for Information. This was true despite our numerous requests and Xerox's assurance that we had the correct documentation for interpretion.

4/ As previously described, our conciliation plan to analyze the six tapes submitted to us on April 16, prior to the conciliation meeting. Due to problems with Program Research, however, the tapes were not analyzed. Thus, although our interviews seemed to indicate that the finding might be limited to certain departments, we were awaiting "hard" data before committing to such a limitation.

5/ Part of the problem was the continued inability to state definitely whether certain codes were included on the tapes. We were told initially that it was not, and finally that they did not know.

During the period between the first and second meetings, we continued our efforts to identify victims and to refine the statistics. Since Xerox had refused to give us the list of discharged employees, and the mailing list given to the Lusardi, counsel was under a protective order, we were limited to contacting persons who had filed consent forms to opt-in Lusardi. We conducted interviews of approximately fifty victims.

These interviews buttressed our earlier findings. Few terminations of these people categorized as "voluntary", by Xerox" were in fact voluntary in the traditional sense, i.e. ... Although those terminatees listed as voluntary had in fact agreed to be terminated, it appeared that the agreements to leave were coerced. Examples: a 53 year old Program Engineer refused the offer of a voluntary early retirement. He refused initially because there were several engineers in his department all in their thirties and with much less tenure. According to the Xerox matrix of termination criteria these engineers should have been terminated before him. When he was told to reconsider he realized he would be involuntary terminated and had no choice but to take the bridge to retirement Program. Soon after he retired several new college graduates were hired into his department. A 59 year old Technical Program Manager in the Reproductive Business Group was denied training and promotion opportunities and was eventually told by Steve McGrath, Vice President to accept the voluntary RIF or he would be involuntarily terminated. Vice President McGrath told him he wanted to "level with him" that there were not alternatives for him at Xerox. The two examples are typical of the testimony of the employees terminated during 1980 through 1983. If they did not take a "voluntary" RIF or the Bridge to Retirement they would soon be involuntarily terminated with little or no severance pay. The former employees usually state that they were replaced by younger employees or by newly hired recent college graduates.

These allegations took additional importance, when a preliminary analysis prepared by our expert showed tremendous disparities in terminations in the VRIF category of employees over fifty.

Finally, on September 11, 1984, six months from the original submission and one day before the second conciliation meeting, we received the third set of computer tapes and documentation. This third submission substantially met our requirments of the February 7, 1984 Request for Information. This was the first response that the job family codes, although such information was clearly part of our first request, and was specifically requested on several interim occasions.

This was the first response that included usable job family codes. Such information was clearly part of our first request for information, and was specifically requested on several interim occasions.

THE SECOND MEETING

The second Conciliation Meeting was held September 12, 1984. Representing Xerox were several officials, their expert and both their inhouse and outside attorneys. Present from the Commission were several attorneys, the Assistant and Associate General Counsel, a representative from the Chairman's office and our expert. Xerox characterized their presentation at that meeting as "their side of the story" which set out criteria and procedures upon which their Reductions-in-Force have been based.

Dr. Reisler, our expert, presented and explained some of the results of his analyses of the computer data previously supplied by Xerox. His analytical approach was one which used the Xerox data itself to measure the company's performance so as to avoid creating a picture of what the Xerox work force should look like by age. Dr. Reisler's analysis, which essentially compared the age ratios of hires to terminations in 1981 through 1983 with the same ratio in 1980, revealed striking differences in the age patterns of Xerox employment. The ratios of hires to terminations as a function of age show apparent age discrimination particularly in 1982 in the ages 49 through 53 and 58 through 60.

In addition to our expert's presentation, we reiterated the pattern of statements we had consistently found in the many interviews we had conducted with former Xerox employees in regards to their "voluntary" termination.

Xerox presented both a statistical analysis and a detailed explanation of what they described as the procedures and rationale they followed in making termination decisions. Dr Medoff, the Xerox expert, included only involutary RIF's in his termination analysis. Xerox contends that all "voluntary" terminations were truly voluntary and are therefore irrevelant in any analysis of possible discrimination. The statistical analyses presented by Xerox were very general in grouping all employees into over 40 and under 40 then comparing percentages of actives and separations for the two groups. Xerox asserted that the results of the analyses, because little or no disparity between the two groups appeared, showed there could have been no discrimination on the basis of age. Our expert pointed out that their analyses did not include "voluntary" terminations which we believe were frequently not voluntary and that the results of their analyses were not persuasive because by separating employees into only two huge groupings, significant statistical disparities may be hidden.

Xerox officials made a lenghty presentation describing the financial plight the company has been in and the development of the criteria they used to select employees for termination. They asseted that it had been a financial necessity to reduce the number of employees. The Reprographics Business Group headquartered in Rochester, New York and greatly affected by the poor economy in the early eighties, was presented as an example of how the perceived need to reduce costs was achieved. 6/

Xerox developed a matrix of years of service and performance evaluation levels into which each employee was placed and termination decisions could then be made according to the employee's place in this matrix. The matrix, which was developed in-house and without any scientific basis, places in one cell all employees with the most common level 3 performance and with years of service from zero to 14 years. We pointed out that many former employees we had interviewed alleged that within that cell they, as an employee with 14 years service, had been terminated while recent college graduates with less than one year placed in the same cell and were not terminated.

Xerox asked us to believe they undertook these necessary RIF's with the best intentions and using non-discriminatory, objective criteria. They asked us to end our investigation as the private lawsuit Lusardi was protecting the rights of those who believe they have been discriminated against. Alternatively, they asked us to narrow the focus of our investigation to just involuntary RIF's or to a few positions.

Because we had the fundamental disagreement over whether the "voluntary" RIFs were truly voluntary, we renewd our request that Xerox provide us with the names of those shown on computer tapes as voluntary RIFs so that we could conduct further interviews. 7/ Xerox has consistently declined to comply with our original Request for Information, sent in February 1984, which specifially asked for employees' names. Before the meeting closed, Xerox indicated that it would take this and some other data requests under advisement. On November 8, 1984 Xerox sent a letter which addressed certain data requests but indicated that release of the VRIF list was still under consideration.

THIRD CONCILIATION MEETING

6/ The former V.P. of the Reprographic Business Group described as "wrenching and heartbreaking" the difficult termination decisions as the Xerox economic difficulties mandated reductions in force. Later we were supplied with documentation which showed this official and other high officials acknowledged in a March 1983 personnel planning meeting that Xerox had hired almost as many people as were terminated during those years and that the hires consisted of new college graduates and younger employees who are cheaper to employ.

7/ Obviously, an important aspect of making our analyses complete would be interviews with persons who had not opted-in Lusardi, and could not be categorized in any way as "digruntled".

The last conciliation meeting was held on November 28, 1984, at that meeting, the Commission again requested that Xerox release the names of the VRIF employees. Xerox refused to produce the list and asked the Commission to consider the option of individual relief for those terminated employees that we determined were entitled to relief. Thereafter, on December 6, 1984, Phil Smith communicated to James Finney that the VRIF list would not be released; he indicated that the decision had been discussed with upper management and was final.

Once it became apparent that Xerox was not going to provide the VRIF list, we attempted to locate these people through alternative means. Initially, we sought to identify potential victims through a word of mouth campaign. This method, of course, was highly ineffective, but, under the circumstances it was our only method for proceeding. Our starting point was with names provided by the Lusardi attorneys. We asked all of the victims that we had contacted in the Lusardi lawsuit if they knew of similarly situated employees. They did give us names of other employees who were riffed, however, all but a few of those contacted have also opted into the Lusardi lawsuit. Also, because of the high skill or technical nature of the riffed jobs the victims tended to become highly mobile in search of new employment, thus, adding to our difficulty in identifying victims.

CURRENT STATUS

As indicated above, without receiving additional names from Xerox, we have been unable to locate many victims who are not in, or attempting to be in the Lusardi case. To locate additional victims, we must either advertise or serve Xerox with a subpoena. That undoubtedly, would have to be litigated before Xerox would comply.

If we decide not to further develope our own action, an option is to seek private counsel's permission to secure relief for those persons not currently members of the Lusardi class. (As previously noted, although these people are not included in the Lusardi class, they have signed retainer agreements with private counsel). However, since counsel has indicated that he intends to move the court for their inclusion, it is not likely that he will agree to fragmenting his clients at this time. Moreover, because of the timing of the terminations there would be only limited backpay. Thus the development of our anecdotal case is at a turning point.

Our statistical case is also at a turning point. It has been determined from our review and discussion of the current statistical analysis with our expert Dr. Don Reisler, that if the Commission is to further develop and refine the statistical evidence of age discrimination by Xerox, we need to contract for additional work. The additional analyses are necessary because we did not receive the complete tapes and code documentation until approximately seven monthes after Xerox represented to the Commission that they had given us all of the computer tapes pursuant to our Request for Information, After review and analysis, Dr. Reisler, informed us that the last group of tapes substantially complied with our initial request. However, they are extensive and contained 76,000 files. We would like to develop an extensive analyses of the third set of tapes. The analyses would be divided into four major task with several subtasks. The first task would include an examination of the hiring rates, termination rates, workforce composition and comparisons across the years. The data would be grouped in several different ways in order to learn the way it acutally developed at Xerox. The first major task would be to subdivided into four separate analysis. The second major task would be to reproduce the analyses of Xerox's expert witness Professor Metoff. This task is necessary because Dr. Metoff's analyses left several questions unanswered, (1) why were all of the voluntary RIF's left out of his analysis and (2) why did he aggregate all of the employees under 40 and over 40. We believe this aggregation has hidden specific areas of age discrimination at Xerox. The completion of this task and the two subtasks would give us a more critical understanding of Dr. Metoff's analysis. The third task would include graphical displays that would highlight the findings of tasks 1 and 2. The fourth task would be a detailed report that would describe the methodology and findings of the investigation and would include a presentation and discussion of the results with the Commission attorneys.

Some of the tasks can be done separately. Although some clearly require that the other task be completed first. The following cost are for the completion of the tasks and subtasks. Task 1, $22,000; Task 2, $17,000; Task 3,$3,000; and Task 4, $8,000. We will need a total of $50,000 to complete the analysis of the third set of tapes. The $50,000 represents one-third of the amount that we projected in the FY 85 budget for the statistical analysis in the Xerox investigation/litigation.

CURRENT EVIDENCE

Analysis of the personnel files of charging parties that were interviewed shows that CP's performance records were good or very good prior to their terminations. These files contain no evidence of high level review of the termination decisions as required by Xerox's personnel termination policies. Notwithstanding, Vice President, Steve McGrath's emotional recitation of the moral decadence he had to overcome each time he had to RIF an older employee.

The Xerox Personnel Manuals set out, for each major group and division, company policy as to termination procedures, the matrix of criteria upon which employees are to be selected for termination, the criteria for retirement eligibility and the type of benefits for which employees are eligible. The manuals describe the Bridge to Retirement Program, initiated by Xerox in 1981, which was made available to employees 51 1/2 and stretches their severance to cover them up to the age when they are eligible for retirement benefits. For most employees that age is 55. This was a good program and many RIF'd employees took advantage of the benefits. However, our evidence indicates that the problem was not the program per se but the involuntary manner an older employee was overtly or covertly forced to accept it or force to take an involuntary termination.

Our interviews of charging parties/Lusardi plaintiff's, former employees who have attempted to opt into the Lusardi lawsuit and the four non Lusardi former employee from around the county and from different jobs and divisions say basically the same thing about the circumstances of their termination or retirments. Their testimonial evidence indicates a strong case of a pattern and practice of the Xerox's deliberate corporate policy directed and implemented by corporate officials to terminate employees over forty on the basis of age only, in violation of the ADEA.

The statistical evidence has change for time to time because of Xerox's constant misinforming the Commission. The three different submission without the necessary documentation created problems in reading the tapes and making any meaningful hard analyses. However, Dr. Reisler had been able to pull some data off the first two sets of tapes that shows a statistically disproportionate pattern of employment actions based on age. The lack of supporting documentation for these tapes prevented him from refining his analysis. He has informed us that the third set of tapes will allow him to perform a detailed analysis that will buttress the earlier findings.

Xerox's records of advertising to seek job applicants in the middle of mass terminations supports the testimonial evidence. The records show that Xerox was advertising around the country in major newspapers throughout the greatest periods of terminations for engineers, sales representatives, system analysts, marketing managers and other positions. Many of the terminated employees could have qualified for the jobs and transferred to openings as provided by Xerox personnel policies.

RECOMENDATIONS

The first reommendation is to develope and refine the statistical evidence of age discrimination by Xerox. The third set of tapes submitted by Xerox complied with our original request. These tapes will allow the Commission to contrast and compare the types of termination by groups in age bands, by locations, positions, performance ratings and salaries. These analyses were planned initially but not performed due to our inability to correctly interpret the data because of Xerox's misrepresentations of what was actually on the tapes. Enclosed as Exhibit D is the complete

BEST AVAILABLE COPY

contract package for the additional statistical analysis including the justification for a sole source contract and a statement of work. We think the statistical case is very strong. Based on our inteviews and other documentary evidence we think this analysis will isolate specific areas where Xeorx's liability will be exposed.

Simultaneously with the statistical analyses we should make every effort to identify former employees who have not opted into the Lusardi lawsuit. We attempted to identify former employees through the word of mouth method without success. We made several request to Xerox for the VRIF list but they refused to release the list. It appears unlikely that we will get this information without subpoena litigation.

As an alternative to identifying the former employees from the VRIF list we've explored the possibility of running a nationwide notice in seven or eight national and local newspapers. The size of the advertisement and the length of time it runs must be considered in determining the economic feasibility of pursuing this option. The cost of a quarter page ad in the Wall Street Journal (national edition) to run three times would cost $56,517. The same ad running in the Rochester Democrat Times would cost $5,578. In the same papers, an eighth of a page ad would cost $28,259 and $2,789 respectively. These two papers represent the highest and the lowest cost of the nine papers contacted in the areas we think the former Xerox employees may have been employed or relocated. (See Exhibit E)

We must also consider Xerox's suggestion that we attempt to conciliate individual claims. However, we recommend that the Commission should not conciliate for the following reasons: First, this would be limited to the four individuals who are not represented by private counsel. (See Exhibit F) If we secured counsel's permission, we could possibly include an additional 50 victims whose claims of discrimination fall after March 31, 1983. (See Exhibit G) However, private counsel has indicated that he intends to move the court for their inclusion, it is unlikely that he would agree to fragment settling claims at this time.

Assuming that we could secure counsel's permission to conciliate these claims, the backpay would be limited. Almost all of the victims were terminated with some type of pay continuance ranging from two weeks to 30 months. Theoretically, some of the victims may not be entitled to any back pay. The greatest harm suffered by most of these victims is the reduction in retirement benefits. Since Xerox's potential liability on that issue in the lawsuit is enormous, it is unlikely they would in conciliation give any adjustment in retirement benefits. We think the Commission's conciliating these few claims for nuisance value relief would have a negative impact on the Lusardi litigation, which is currently in the initial discovery stages. Unless a settlement resulted in full relief for these people, including reinstatement if they wanted it, our action could limit their recovery to an amount much smaller than their potential recovery from the Lusardi suit. If it's decided to conciliate the claims with the Lusardi's counsel permission, we think there should be a pre-conciliation agreement with Xerox that the Commission would be entitled to additional discovery on each individual claimant to insure that we would be able to obtain sufficient evidence to present a make whole relief claim.

We should consider an intervention action in the Lusardi lawsuit in New Jersey. Even though this case was filed in March 1983 we do not anticipate any serious problems procedurally with the intervention. The Lusardi attorneys have not,as of this date, embarked on any extensive discovery. Very few depositions have been taken and most of the interrogatories are still outstanding. The Lusardi attorneys told us earlier in this litigation that they would be happy to have the Commissions participate in their litigation and would be willing to share their discovery with us.

We could represent the former employees that have tried to opt into the Lusardi lawsuit but could not because their action 8/ arose too late or they have not tried to join the suit at all. We would have to make some financial arrangements with the Lusardi attorneys in regards to a cost arrangment. It is suggested that since we have started on the statistical analysis and have an expert familiar with the case, that the Commission bear the expense of the expert witness and the computer analyses. We believe that the cost would be controllable because Xerox has all employment data computerized in clear workable date base and we believe that the issues in this case are fairly narrow and focused.

We think an intevention in this case is a very good ADEA litigation vehicle. The evidence that we have obtained for the Lusardi attorney and our evidence for the investigation indicate that Xerox systematically violated the ADEA in numerous facilities nationwide. The projected relief will be several million dollers in backpay and lost pensions and any settlement or court ordered relief will have a nationwide impact. However, a substantial amount of the Commission's resources must be made available in order to obtain this objective.

Finally, we could issue a notice that conciliation has failed, and not pursue our own action or seek intervention at this time. Xerox has shown that it is unwilling to take any action which would lead to a meaningful settlement of the EEOC charges the consistent position of the company has been to prolong the negotiations and to attempt to reduce the negotiations to haggling over possible discrimination toward individudal employees. Since the inception of the investigation Xerox has engaged in dilatory tatics and have misrepresented the facts to the Commission on many different occassions. They have been less than cooperative prior to and during the conciliation period and there is no indication that their tactics will change in the future. They have only said they are willing to discuss the individual cases of former employees if we can prove to them that these people suffered age discrimination. Because of their considerations in the defense of the private lawsuit, their strategy and conduct in attempting to trivialize our investigation are not surprising and are unlikely to change unless they want to settle the private suit. We could document all of Xerox's failure to cooperate with the Commission's investigation throughout the conciliation period. Moreover, I think our efforts for the last twelve months have satisfied the statutory duty pursuant to 29 U.S.C. § 626 (b).

Should we not pursue litigation at this time you should look at the follow facts. The Lusardi lawsuit address the same issues that we seek to address. Even though the Commission, in the public interest could represent the VRIF claimants who did not opt into Lusardi, we note that these claimants, mostly highly educated managerial, professional and sales personnel, all had the opportunity to opt-in Lusardi and declined to do so. Therefore, there is no overwhelming damage which will occur if the Commission declines to litigate.

8/ Approximately 6000 employees over 40 years old were terminated and only 1300 opted into the Lusardi lawsuit.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Aug P 1985

MEMORANDUM

TO : James N. Finney
Director, Systemic Programs

THRU : Leroy T. Jenkins, Jr.
Director, Legal Enforcement & Coordination

Estelle D. Franklin
Supervisory Trial Attorney

FROM : Carlton L. Preston
Senior Trial Attorney

Judith L. Mathis
EOS

SUBJ : Xerox Recommendation Memorandum

Attached is a memorandum detailing the history, current status and recommendation for future action in the Xerox ADEA action. Although several alternatives are discussed, the conclusion is that intervention in the Lusardi case would best serve the interest of the Commission.

Because the memorandum is extensive, we have attached for your reference, an outline index of the memorandum, as well as an exhibit list.

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EXHIBIT LIST

A - Letter from J. Finney to D. Reid (VP, Personnel, Xerox) initiating ADEA investigation (2/7/84)

Request for Information accompanying 2/7/84 letter above.

B - Memorandum from C. Preston to J. Finney recommending that a LOV be issued (4/26/84)

C - Letter of Violation (4/29/84)

D - Witness Interview Lists

E - Letter from S. Adler (Lusardi counsel) to C. Preston transmitting names of potential victims and cautioning EEOC not to reveal information obtained in interviews to Xerox. (12/19/84)

F - Memorandum from J. Mathis to E. Franklin regarding the cost for advertising.

G - Presentation Memorandum for intervention, and proposed complaint in intervention. (To be used if intervention option is selected).

H - Requisitions for additional statistical work and advertising. (To be used if class conciliation is selected).

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

May 10, 1985

MEMORANDUM

TO : James N. Finney
Director
Systemic Programs

THRU : Leroy T. Jenkins, Jr.
Director
Legal Enforcement and Coordination Division

Estelle D. Franklin
Supervisory Trial Attorney
Legal Enforcement and Coordination Division

FROM : Carlton L. Preston
Senior Trial Attorney
Legal Enforcement and Coordination Division

Judith L. Mathis
Equal Employment Specialist
Legal Enforcement and Coordination Division

SUBJECT : Recommendation on Disposition of EEOC v. Xerox
ADEA Investigation/Conciliation

On April 19, 1984, the EEOC issued a letter of violation pursuant to the ADEA against the Xerox Corporation. Under the ADEA, this letter tolls the statute of limitations for up to one year. Since that period has now expired, this memorandum will present our recommendation for what should occur next.

I. HISTORY

A. Background

The EEOC first became involved in investigating Xerox for ADEA violations in August, 1983. During our monitoring of nationwide discrimination lawsuits for the intervention project, the Legal Enforcement Division became aware of a pending lawsuit alleging age discrimination by Xerox. Lusardi, et al. v. Xerox, C.A. 83-809 (D.N.J.). Our initial efforts were directed towards an intervention. We met with the Lusardi attorneys and discussed the possibility of the Commission becoming involved in their lawsuit through intervention or direct lawsuit. They welcomed our participation and agreed to share discovery information they had obtained if it was not covered by a protective order.

A presentation memorandum to intervene in the Lusardi litigation was prepared and sent to the Commission seeking litigation authorization. However, the case was never fully presented to the Commission; prior to the date it was to be presented, Commissioner Webb raised questions in regard to the lack of data he believed necessary to support Commission litigation.[1] We subsequently decided to withdraw the presentation memorandum until the data could be supplemented.

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[1] This is a frequent problem in interventions. A not uncommon pattern is that the suit has been initiated by private parties prior to completion of the Commission's investigation; if intervention is sought early in the case (as it should be in order to be timely) only limited discovery has taken place. Additionally, discovery is frequently subject to a protective order, and thus not available to the Commission.

The presentation memorandum in this instance was based on limited data in our possession and included speculation on other data anticipated to be obtained from future statistical analyses as well as documentary evidence alluded to by the Lusardi attorneys.

After considering the merits of intervening in the Lusardi litigation at that time we decided, that proceeding with our own investigation would be a more desirable course to follow. On February 7, 1984, a letter was sent to Douglas M. Reid, Vice President for Personnel of the Xerox Corporation announcing that the Commission was initiating an investigation to determine whether there was reasonable basis to believe that the ADEA had been violated. (See Exhibit A)

B. The Judicial Investigation and Letter of Violation

Throughout this investigation, Xerox has been recalcitrant. In our initial letter to Xerox on February 7, 1984, we included a request for information. The request asked for computer files and applicable code documents of Xerox personnel employment data, and required that the data be submitted within twenty-one (21) days.

Prior to the expiration of the twenty-one days, Phil Smith, Associate General Counsel for Xerox, requested a meeting to develop an orderly approach for the production of data in response to our request for information. During the course of setting up such a meeting, in a conversation between Carlton Preston and Judy Mathis for the Commission and Phil Smith for Xerox, we requested that Xerox bring to the meeting one of their computer experts who was familiar with its computerized personnel records, and the computer codes used by Xerox. It was our belief that a direct approach as this would simplify the discovery process. Phil Smith specifically agreed to do this, and the meeting was scheduled for March 13, 1984.

The first meeting was held as scheduled on March 13, 1984. The Commission was represented by Estelle Franklin, Judy Mathis, Richard Meyerson and Carlton L. Preston. Xerox was represented by Phil Smith and Bob Landsmann, staff labor attorney.

The Commission informed the Xerox officials that our information and analysis indicated that the Xerox Corporation was in violation of the ADEA on a systemwide basis. They denied any violation of the ADEA and assured us that when we reviewed and analyzed the data they were to provide us, Xerox would be exonorated.

After the initial exchange of positions, we discussed our request for information. Phil Smith stated that it would take Xerox twenty-seven (27) weeks in order to comply with our request for information. When questioned about the absence of the computer person, Phil Smith merely stated that he was "unavailable." He assured us, however, that all necessary documentation would be included with the computer tapes forthcoming under the agreements outlined below. The meeting was concluded with agreements being reached by both parties.

The Commission agreed to:(1) delete from our information request any personnel files that Xerox had produced at any Commission field office, to cut the expense of duplication; (2) accept all non-computerized data as it because available rather than waiting until the entire request was completed; (3) consider confining our initial computer data request to include data which will be compiled from the Personnel Data System (PDS) which included 85% of the salaried employees; (4) delete from our initial request for computer data, information regarding the foreign subsidiaries Fuji Xerox and Rank Xerox Limited; (5) consider a compromise as to the specific salaries we have requested and decide the persons to whom we would allow exclusive access to this data; (6) consider eliminating our request for 1980 data; and (7) consider the terms of a Xerox proposed agreement of confidentialty.

Xerox agreed to: (1) provide, during the week of March 16, 1984, the PDS and payroll tapes and code documentation for each applicable year through 1983 and inform us how long the remaining data request would take to produce; (2) consider tolling the running of the statute of limitation during our investigation (while the issuance of an LOV tolls the statute, an investigation does not); (3) provide the performance evaluations of the terminated employees and all training data that was computerized; (4)comply with numbers 8 through 18 of the February 7 request for information within 60 days. 2/

Subsequent to the March 13th meeting, the Commission acted on the matters we had under consideration. We agreed to accept the PDS personel data for the salaried employees and to accept the personnel identification numbers in place of actual employee names, because we were told that it would expedite the delivery of the computer tapes. Our acceptance of the identification numbers was temporary; Xerox understood that we were to receive the names at a later date. 3/ We did not agree to exclude the 1980 data request because we believed that the 1980 data was relevant to the RIF period that was under investigation. We rejected Xerox's proposed protective order because we thought it would be contrary to Commission policy and could possibly set an unwarranted precedent for all Commission offices receiving data from respon dents in the investigative stages. Moreover, it was unclear as to who would determine if a breach occurred and what, if any, remedy would be appropriate.

Xerox was prompt in its consideration of the proposed agreements of the March 13 meeting. We were informed that training information was not computerized but performance evaluations were and would be included in the forthcoming tapes. They also informed us that they would not agree to tolling of the statute of limitation without explaination.

Xerox delivered the first of three submissions of computer tapes during the week of March 16, 1984 as promised. They explicitly stated that had they fully complied with our February 7, request, as modified by the agreements outlined above, including the applicable code documentation. However, the code documentation was not included. We immediately initiated inquiries concerning the missing codes, and were assured that all needed codes were contained on the tapes.

Although we were not satisfied that the tapes were complete, we started a preliminary analysis in order to keep the investigation moving. (This posture was taken also in light of Xerox's refusal to toll the running of the statute). However, absent full compliance with our request, we could not fully manipulate the data we had received and could only perform general statistical analyses.

Our initial statistical analysis showed that a disappropriate number of employees over forty years of age were terminated pursuant to a Reduction-in-Force (RIF). 4/ Xerox terminated approximately 6000 employees over the age of forty during the RIF period (1980-1983). Xerox classified these terminations as voluntary (VRIF) or involuntary (IRIF).

However, our interviews with various riffed employees, including several persons who had filed charges with the Commission, indicated that the so called voluntary RIFs were not in fact voluntary but rather were coerced.

2/ Requests 8-18 sought non-computerized information such as copies of various personnel manuals and written explanations of various personnel practices, particularly those concerning terminations and lay-offs.

3/ Notwithstanding the fact that we agreed to alter our initial request to accept the PDS computer data, in order to expedite the discovery process, Xerox did not competely comply with even our altered information request until six months later. We agreed to accept the salary records of those employees under salary grade 19. Again we accepted a partial compliance with our request for all salaried employees because we were told it would assist in expediting the data.

4/ Because Xerox did not send the requested code documentation with the tapes, our experts was only able to do a very basic analysis of the percentage of RIF'd employees in 5 year age bands of employees from 40 through 65.

For example, some interviewees indicated that they were told that their future at Xerox was not good; others felt that the policies had a coercive effect. Xerox had a policy to give some type of pay continuance to its riffed employees for periods lasting from two weeks up to thirty months. But, with each succeeding reduction-in-force, in 1980, 1981, 1982 and 1983, the period of pay continuance was shortened. The "voluntary" terminated employees told us that when they were given an offer to leave voluntarily with a specific amount of time with pay continuance, they accepted the offer because of the uncertainty of how long the pay continuance would be in the next round of terminations.

In addition to conducting statistical studies and interviewing witnesses, we continued to receive information from the Lusardi attorneys during our investigation. (The Lusardi attorneys were very cooperative in sharing their evidence with the Commission). We received, in confidence, copies of confidential memoranda written by Xerox officials demonstrating that there was an official plan to to get rid of the older higher paid employees while hiring younger, lower salaried, recent college graduates.

In mid-April, 1984, Xerox submitted a second set of computer tapes with some documentation for interpretation, which Xerox asserted would cure the problems present with the first tapes. However, because of several factors, we decided to issue a Letter of Violation prior to analyzing the second set of tapes. Those factors were: (1) the time lapse in submitting this clarified data (in light of Xerox's violation of the agreements reached March 13); (2) Xerox's refusal to agree to toll the running of the statute of limitations and, most importantly, (3) the evidence previously gathered and analyzed clearly indicated an ADEA violation. The basis for our issuance of the Letter of Violation was detailed in a memorandum to James N. Finney, Director, Systemic Programs, dated April 16, 1984. Our analysis included discussion of documentary, testimonial and statistical evidence that was available at that time. (See Exhibit B).

In that memorandum we identified the issues we intended to continue to investigate and conciliate. The main issue was termination, with hiring and transfers included primarily as they related to the terminations. Promotion and wages were not included as of that time as we had no evidence of age discrimination in those areas. (Of course, if evidence developed in those areas further exploration would take place).

We also defined the potential class size as the 5000 - 6000 terminated salaried employees over forty, and defined the geographic scope as nationwide, but with an emphasis on the Northeast. However we did not define the affected positions or job categories. Although our interviews indicated concentration in certain areas, we could not statistically analyze the personnel data to make sure the limitation held up. In support of our analysis we included documentary, testimonial and statistical evidence that was available at that time.

Thus, based on our interviews with the individual victims, the existence of the documents indicating Xerox's policy to terminate older employees under a RIF while hiring younger employees, and our statistical analysis of the employment data we received, a Letter of Violation was issued on April 19, 1984. That letter stated that Xerox had discriminated against salaried employees over forty selecting them for termination based on age. The effect of the issuance of the Letter of Violation was to toll the running of the statute of limitations for up to one year and begin a period of conciliation. (See Exhibit C)

C. Conciliation Efforts

Our conciliation plan was to quickly get an analysis of the computer tapes submitted in mid-April and prepare for the first meeting. However, we were unable to get a quick analysis. Although we immediately turned the tapes over to the Office of Program Research, they were unable to determine whether all the codes necessary to interpret the data were included on the tapes as Xerox had asserted. Therefore, we were unable to inform Xerox specifically whether we needed additional data or additional code documentation to interpret the tapes. (In fact, we initially informed Xerox that the codes were still missing; when they informed us that the necessary documentation was embedded in the tape, we were unable to respond). The inability to get this information impacted on our first conciliation meeting by preventing us from being able to make a sufficiently detailed presentation which may have swayed Xerox from its position.

Another matter which has impacted on our conciliation efforts is the Lusardi lawsuit. Thus, before discussing concilation, it is necessary to review the action in the Lusardi case between the time we withdrew our request for authorization to intervene and May 23, 1984, the date of the first conciliation meeting.

During that period, the Court authorized notice to be sent to all present Xerox employees and to former Xerox employees who were terminated between March 1980 and March 31, 1983, to give them the opportunity to opt into the suit. (Unlike Title VII, individuals other than the named plaintiff are not covered by a lawsuit unless they specifically opt-in). The cut-off date for these persons to file the necessary papers to opt-in was May 9, 1984. By our first conciliation meeting on May 23, approximately 1300 persons had sought to opt-in to the Lusardi lawsuit.

1. The Fisrt Meeting

Pursuant to § 7(b) of the ADEA we met with the Xerox officials on May 23, 1984, for our first conciliation meeting. The Commission representatives were Estelle Franklin, Judy Mathis, Richard Meyerson and Carlton L. Preston. The Xerox representatives were Phil Smith, Steve McGrath (Vice President, Personnel), Charles Gilliam, (staff attorney) and Bob Landesman.

We presented our position that the evidence we had gave us reason to conclude that, at least since 1980, there had been a deliberate, systemwide effort by Xerox to terminate the over 40 year old, higher paid professional employees, and that this effort was either directed by or condoned by high level Xerox management.

Xerox denied that it was in violation of the ADEA and raised a business necessity defense. Its position was that the terminations were part of a reduction in force to streamline its operation. It asserted that this streamlining was necessitated by a downturn in business due to increased competition, primarily from the Japanese.

They also said that if a disproportionate number of older employees were riffed, it was not due to discrimination because most of the terminated employees voluntarily chose to leave the company. This was especially true of the older employees since they were offered the "Bridge to Retirement". 5/

We disagreed with their business necessity defense for the termination of those over 40 employees, and indicated that we believed it was a pretext for discrimination. We noted that the amount of hiring that had occured during the period had virtually offset the terminations, and also cited many occasions on which Xerox had violated its personnel policies and procedures, by not providing the requisite levels of review by high level management necessary to terminate an employee.

In response to Xerox's position that most of the terminations were voluntary, we informed them of the interviews of terminated employees who stated that they had a choice between being fired or taking a voluntary termination. Xerox's response was that our witnesses were a minority of disgruntled employees and did not represent what actually happened or the views of the majority of the former employees.

A final area of discussion, in light of the Lusardi lawsuit, was the scope of any Commission action. Xerox contended that the Commission could not secure relief for any one who had opted into the Lusardi suit. It also opined, without citing authority, that anyone who had received notice of Lusardi and failed to opt in had waived their rights. Our position was that we represented the public interest, and as such, could obtain relief for all victims, including those seeking relief through the Lusardi suit.

5/ Under this program, employees age 51 to 53 were allowed to spread their salary continuance over a three year period, until they would be ready for early retirement. They were also allowed to remain in profit sharing and maintain their health and life insurance coverage for the interim period.

Xerox also wanted to know whether our findings of discrimination was limited to any particular departments, but we declined to limit our findings pending further analysis of information. 6/

Prior to ajourning we discussed the tapes and the missing documentation. They assured us that the second set of tapes, which had been delivered to us a few days prior to the meeting, were complete with documentation, and that they would vindicate Xerox's position that it did not violate the ADEA in its employment decisions.

Finally, the meeting closed with our agreeing that a second meeting would be scheduled shortly after completion of the analysis of the second set of tapes. We also informed them that the Commission could file a lawsuit if conciliation failed and that terminated employees may potentially recover backpay from Xerox.

2. Continued Analysis

During the period between the first and second meetings we continued our efforts to refine statistics and identify victims.

a. Statistical Work

For aproximately two months the computer staff of the Office of Program Research was in contact with Xerox's computer staff without measurable results. Even utilizing the accompanying documentation, we were not getting satisfactory action in Program Research. We ultimately hired Don Reisler of DBS Corporation as an outside expert. 7/

After numerous exchanges of correspondence and telephone conversations, Xerox finally agreed to produce Tom Stone, its computer employee, who created the computer tapes submitted to the Commission. On July 20, 1984, Carlton Preston, Richard Meyerson and Judy Mathis of the Commission, and Don Reisler, met with Tom Stone at Xerox's headquarters in Stamford, Connecticut.

In talking with Mr. Stone, we learned for the first time that the documentation we received with the tapes was meaningless in interpreting the personnel data as indicated in our Request for Information. Primarily, we were unable to group similar jobs by department and division. This prevented us from corroborating victim assertions that the RIFs were taking place at the same time younger people were being hired into the same or similar positions. Xerox's failure to provide the appropriate codes was in the face of our numerous requests and Xerox's assurance that we had the correct documentation for interpretation.

We were, however, able to do some analyses with the new tapes utilizing various age bands within the protected age group. As these analyses were done, it became apparent that the disparities occured in the over fifty age group. Additionally, we conducted analyses which compared the ratio of terminations by the categories of voluntary rifs, involuntary rifs, lay-offs, and other (including voluntary quits and discharge for cause). Our analyses showed a disproportionate number of employees over fifty (50) in the voluntary RIF category. Moreover, because we used Xerox's own pattern in 1980 as the "norm" for the comparative basis, our study cannot be attacked as being compared to inappropriate industries, or even to Xerox's alleged fast growing competition.

6/ As previously described, our conciliation plan to analyze the six tapes submitted to us on April 16, prior to the conciliation meeting. Due to problems with Program Research, however, the tapes were not analyzed. Thus, although our interviews seemed to indicate that the finding might be limited to certain departments, we were awaiting "hard" data before committing to such a limitation.

7/ Part of the problem was the continued inability to state definitely whether certain codes were included on the tapes. We were told by Program Research initially that they were not, then that they were, then again that they were not and finally that Program Research did not know.

Finally, on September 11, 1984, six months from the original submission and one day before the second conciliation meeting, we received the third set of computer tapes and documentation. This third submission substantially met the requirements of our February 7, 1984 Request for Information. This was the first response that included useable job codes, although such information was specifically requested on several interim occasions.

b. Victim Identification and Interviews

Our efforts at victim identification were also being stymied by Xerox's actions. Since Xerox had refused to give us the list of discharged employees, and the mailing list given to the Lusardi counsel was under a protective order, we were limited to contacting persons who had filed consent forms to opt-in Lusardi. We conducted interviews of approximately fifty victims.

These interviews buttressed our earlier findings: few of the terminations of these people categorized as "voluntary" by Xerox were in fact voluntary in the traditional sense. Although those terminatees listed as voluntary had in fact agreed to be terminated, it appeared that the agreements to leave were coerced.

For example, a 53 year old Program Engineer refused an offer of a voluntary early retirement. He refused initially because there were several engineers in his department in their thirties and with much less tenure, and according to the Xerox matrix of termination criteria, these engineers should have been terminated before him. When he was told to reconsider, he realized he would be involuntarily terminated and had no choice but to take the Bridge to Retirement Program. Soon after he retired several new college graduates were hired into his department.

Another example is a 59 year old Technical Program Manager in the Reproductive Business Group who was denied training and promotion opportunities and was eventually told by Steve McGrath, Vice President to accept the voluntary RIF or he would be involuntarily terminated. Vice President McGrath told him he wanted to "level with him" that there were not alternatives for him at Xerox.

These two examples are typical of the testimony of employees terminated during 1980 through 1983. 8/ If they did not take a "voluntary" RIF or the Bridge to Retirement they would soon be involuntarily terminated with little or no severance pay. Moreover, the former employees usually stated that they were replaced by younger employees or by newly hired recent college graduates.

These allegations took on additional importance, since, as detailed above, the analysis prepared by our expert on the mid-April tapes showed tremendous disparities of employees over fifty in terminations in the VRIF category.

c. Documentary Evidence

During this period, we also reviewed and studied the documents which we received in response to request numbers 8-18. This included review of the personnel files of charging parties and portions of the personnel manual regarding terminations and the Bridge to Retirement.

Analysis of the personnel files of the charging parties who were interviewed showed that their performance records were good or very good prior to their terminations. These files contain no evidence of high level review of the termination decisions as required by Xerox's personnel termination policies (notwithstanding Vice President Steve McGrath's emotional recitation at the conciliation meeting of the moral dilemma he had to overcome each time he had to RIF an older employee).

The Xerox Personnel Manuals set out, for each major group and division, company policy on termination procedures, the

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8/ A complete list and summary of all interviews over the course of our investigation and conciliation is attached as Exhibit D.

matrix of criteria upon which employees are to be selected for termination, the criteria for retirement eligibility and the type of benefits for which employees are eligible.

The manuals also describe the Bridge to Retirement Program, initiated by Xerox in 1981, which was made available to employees 51 1/2. This program allowed them to stretch their severance pay to cover them up to the age when they are eligible for retirement, in most instances age 55, and allowed them to retain various other benefits until they would be picked up by the retirement program. Although this appeared to be a good program and many RIF'd employees took advantage of its benefits, our evidence indicated a problem, not with the program per se, but with the involuntary manner in which older employees were overtly or covertly forced to accept it or faced with an involuntary termination.

3. The Second Meeting

The second conciliation meeting was held September 12, 1984. Representing Xerox were several officials, their outside expert and both their in house and outside attorneys. Present from the Commission were several attorneys, including age act specialists, the Assistant and Associate General Counsel, Systemic Programs, a representative from the Chairman's office and our outside expert. The Commission presented its findings, followed by Xerox's presentation.

Our expert, presented and explained the results of his analyses of the computer data supplied by Xerox in mid-April. As previously detailed, his analytical approach was one which used the Xerox's own pre-rif patterns to measure the company's performance. This approach had the advantage of avoiding presumptions about what the norm for Xerox was, by comparing it to itself as opposed to comparing it to other companies.

Dr. Reisler's analysis, which essentially compared the age ratios of hires to terminations in 1981 through 1983 with the same ratio in 1980, revealed striking differences in the age patterns of Xerox employment. The ratios of hires to terminations as a function of age show apparent age discrimination particularly in 1982 in the ages 49 through 53 and 58 through 60.

In addition to our expert's presentation, we reiterated the pattern of statements we had found consistently in the many interviews we had conducted with former Xerox employees in regards to their "voluntary" termination.

Xerox characterized their presentation at that meeting as "their side of the story" and presented both a statistical analysis and a detailed explanation of what they described as the procedures and rationale they followed in making reduction-in-force termination decisions.

Xerox officials first made a lengthy presentation describing the financial plight the company has been in and the development of the criteria they used to select employees for termination. They asseted that it had been a financial necessity to reduce the number of employees. The Reprographics Business Group headquartered in Rochester, New York and affected greatly by the poor economy in the early eighties, was presented as an example of how the perceived need to reduce costs was achieved. 9/ It also presented some general employment statistics which showed a reduction in the Xerox workforce, worldwide and nationally.

6/ The former V.P. of the Reprographic Business Group described as "wrenching and heartbreaking" the difficult termination decisions as the Xerox economic difficulties mandated reduction in force. Later we were supplied with documentation which showed this official and other high officials acknowledged in a March 1983 personnel planning meeting that Xerox had hired almost as many people as were terminated during those years and that the hires consisted of new college graduates and younger employees who are cheaper to employ.

Dr. James Medoff, Xerox's expert then made a statistical presentation. Xerox's analysis compared only pre-forty and post-forty age bands. The first item examined was the mean age before and after the RIF, which was 37 before the RIF and 38 after the RIF. Xerox also made a detailed study of involuntary RIFs, which compared the percentage of active employees with the percentage of involuntary RIFed employees. This study showed that there was no disparities among employees over 40. Xerox asserted that the results of the analyses showed there could have been no discrimination on the basis of age because little or no disparity between the two groups appeared.

Our expert pointed out that their analyses did not include "voluntary" terminations, which we believed were frequently not voluntary, and that the results of their analyses were not persuasive because by separating employees into only two huge groupings, significant statistical disparities may be hidden. Xerox contended that all of the voluntary RIFs were truly voluntary, and therefore irrelevant in any analysis of possible discrimination.

In addition to its statistical presentation, Xerox also attempted to demonstrate that its termination selection procedures were nondiscriminatory. Under these procedures, Xerox developed a matrix of years of service and performance evaluation levels into which each employee was placed and termination decisions could then be made according to the employee's place in this matrix. The matrix, which was developed in-house and without any scientific basis, places in one cell all employees with the most common level 3 performance and with years of service from zero to 14 years. We pointed out that many former employees we had interviewed alleged that within that cell they, as an employee with 14 years service, had been terminated while recent college graduates with less than one year placed in the same cell and were not terminated.

Xerox asked us to believe they undertook these necessary RIF's with the best intentions and using non-discriminatory, objective criteria. They asked us to end our investigation as the private lawsuit Lusardi was protecting the rights of those who believe they have been discriminated against. Alternatively, they asked us to narrow the focus of our investigation to just involuntary RIF's or to a few positions.

The meeting closed with our requesting additional and/or underlying data based on Xerox's presentation. Additionally, because we had the fundamental disagreement over whether the "voluntary" RIFs were truly voluntary, we reiterated our request that Xerox provide us with the names of those shown on computer tapes as voluntary RIFs so that we could conduct further interviews. Receipt of the voluntary RIF list was termed critical. 10/ Before the meeting adjourned, Xerox indicated that it would take the data requests, including the voluntary RIF list, under advisement.

4. Interim Activities

While awaiting Xerox's reponse, we commenced analysis of the third set of tapes. This analysis revealed that the tapes substantially complied with the February 8, 1984 request.

On November 8, 1984 Xerox sent a letter which addressed certain data requests but indicated that release of the VRIF list was still under consideration. Thereafter, they sought to set up another meeting.

10/ Xerox has consistently declined to comply with our original Request for Information, sent in February 1984, which specifically asked for employees' names. As previously noted, we agreed accept the computer tapes without names in an attempt to expedite the process. Since that time Xerox refused to supply the names. Obviously, an important aspect of making our analyses complete would be interviews with persons who had not opted-in Lusardi, and could not be categorized in any way as "digruntled".

5. Third Conciliation Meeting

The last conciliation meeting was held on November 28, 1984, and was attended by James Finney for the Commission and Philip Smith and , for Xerox. Xerox indicated that the request for the voluntary RIF list had been reviewed by senior management, and a decision was made not to release the names to the Commission. Xerox also asked the Commission to consider the option of individual relief for those terminated employees we determined were entitled to relief.

Xerox was told that it should reconsider its decision regarding the voluntary RIF list. Further, we would not make a determination on its suggestion to consider individual relief until a final decision on the voluntary RIF list had been made.

6. Interim Activity

Thereafter, on December 6, 1984, Phil Smith communicated to James Finney that the VRIF list would not be released; he indicated that the decision had been discussed with upper management and was final.

Since it was then certain that Xerox was not going to provide the voluntary RIF list, we attempted to locate these people through alternative means. Initially, we sought to identify potential victims through a word of mouth campaign. This method, of course, was highly ineffective, but, under the circumstances it was our only method for proceeding.

Our starting point was with names provided by the Lusardi attorneys. We asked all of the victims that we had contacted in the Lusardi lawsuit if they knew of similarly situated employees. They did give us names of other employees who were riffed, however, all but a few of those contacted had also opted into the Lusardi lawsuit. Also, because of the high skill or technical nature of the riffed jobs, the victims tended to become highly mobile in search of new employment, thus, adding to our difficulty in identifying victims.

Subsequently, we received from the Lusardi attorneys a list of seventy persons out of the 1300 who had attempted to opt into the Lusardi class but were not then included because (1) the claimed discrimination occurred after March 31, 1983, the Lusardi cutoff date, and, thus, is beyond the scope of the Lusardi class, or (2) their claim was filed after the May 9, 1984, the deadline for filing claims. However, all of these people have signed forms retaining Lusardi attorneys as their lawyers. In his letter transmitting the names Attorney Adler specifically states that we should not disclose any information that we have obtained from the potential class members to Xerox without prior approval from class Counsel. (See Exhibit E)

Our interviews with people from this group revealed that the post March 31, 1983 claims appear to be similar to the pre-March 31, claims covered by Lusardi, except that Xerox apparently discontinued the Bridge to Retirement program shortly after Lusardi was filed. Additionally, we have not yet focused our statistics to cover post-April, 1983 activities, and thus cannot at this time state what statistics concerning that period would show.

D. Current Status

The development of both the anecdotal and statistical cases are now at crucial points: they are about as developed as they can get without a commitment to expend substantial additional funds. Therefore a determination of how we will proceed must be made at this time.

1. Anecdotal Case

As indicated above, without receiving additional names from Xerox, we have been unable to locate many victims who are not in, or attempting to be in the Lusardi case. To locate additional victims, we must either advertise or serve Xerox with a subpoena.

The subpoena is not feasible for two reasons: (1) it is unclear whether we have authority to issue one during conciliation (as opposed to investigation); and (2) based on Xerox's actions to date it is clear that a subpoena undoubtedly, would have to be litigated before Xerox would comply.

Publication therefore is the only feasible option. To be effective, the notice would have to run nationwide, and appear approximately three times. Also, it should be large enough so that it is seen, and not burried in the small print of the legal notices or similar section. Therefore in pricing the ads, we asked for rates for one quarter and one eigth page ads, to run one day for three consecutive week.

The size of the advertisement and the length of time it runs must be considered in determining the economic feasibility of pursuing this option. The cost of a quarter page ad in the Wall Street Journal (national edition) to run three times would cost $56,517. The same ad running in the Rochester Democrat Times would cost $5,578. In the same papers, an eighth of a page ad would cost $28,259 and $2,789 respectively. These two papers represent the highest and the lowest cost of the nine papers contacted in the areas we think the former Xerox employees may have been employed or relocated. A full advertising campaign consisting of advertisements in one national newspaper and several selected local newspapers would cost $147,401. (See Exhibit F)

2. Statistical case

Our statistical case is also at a turning point. It has been determined, from our review and discussion of the current statistical analysis with our expert Dr. Don Reisler, that if the Commission is to further develop and refine the statistical evidence of age discrimination by Xerox, we need to contract for additional work. 11/

The analyses would be divided into four major task with several subtasks. The first task would be subdivided into four separate analyses and would include an examination of the hiring rates, termination rates, workforce composition and comparisons across the years. The data would be grouped in several different ways in order to learn the way it acutally developed at Xerox. The second task would be to duplicate the analyses of Xerox's expert, Dr. Medoff. This task is necessary because Dr. Medoff's analyses left several questions unanswered, namely: (1) would the inclusion of voluntary RIF's in his analysis change the results; and (2) did the aggregation of all of the employees under 40 and over 40 influence his results. We believe this aggregation has hidden specific areas of age discrimination at Xerox. The completion of this task and the two subtasks would give us a more critical understanding of Dr. Metoff's analysis. The third task would include graphical displays that would highlight the findings of tasks 1 and 2. The fourth task would be a detailed report that would describe the methodology and findings of the investigation and would include a presentation and discussion of the results with the Commission attorneys.

Although some of the tasks can be done separately, others clearly require that some other task be completed first. The

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11/ The additional analyses are necessary because we did not receive the complete tapes and code documentation until approximately seven months after Xerox represented to the Commission that they had given us all of the computer tapes. Unfortunetly, the result of Xerox's delay tatics was to cause us to expend funds trying to do the best we could with incomplete tapes. By the time we had received the complete set, there was only enough money remaining to clean up and test the data base, which with some 76,000 files is extensive.

following cost are for the completion of the tasks and subtasks. Task 1, $22,000; Task 2, $17,000; Task 3, $3,000; and Task 4, $8,000. We will need a total of $50,000 to complete the analysis of the third set of tapes. The $50,000 represents one-third of the amount that we projected in the FY 85 budget for the statistical analysis in the Xerox investigation/litigation.

II. DISCUSSION OF ALTERNATIVES

After slightly more than a year of investigation and analysis, we have sufficient anecdotal, demonstrative and statistical evidence to support a complaint alleging age discrimination by Xerox. 12/ Moreover, to the extent our statistics and anectodal evidence is not more refined, Xerox's delaying tactics and lack of cooperation are clearly responsible.

Notwithstanding the above, there are several alternatives which should be considered in making a decision of how best to proceed. In addition to assessing the strength of the currently available evidence, other factors, including the existence of the Lusardi lawsuit, the education and financial level of the claimants, and the prior notice procedures should be carefully balanced in determining whether this is a case in which Commission resources should be expended. At this point there appear to be five options:

(1) Fail conciliation and seek litigation authorization for a direct suit;

(2) Fail conciliation and seek litigation authorization for intervention in Lusardi;

(3) Refine our case and continue conciliation, with any decision on whether to file an action being postponed until a later date. Such refinement may also cause Xerox to be willing to conciliate class relief as opposed to its current suggestion of individual relief). This refinement would include additional statistical work and advertising to identify victims;

(4) Conciliate individual relief for already identified victims whose claims are beyond the scope of the Lusardi action (between 85-100 persons)

(5) Fail conciliation, but decline to take any action on the grounds that the Lusardi suit will provide appropriate relief.

1. Direct Suit

The Commission has met the statutory requirments and is now in a position to file a direct suit. However, there are several problems with this option.

Direct suit has the complicated issue of who would be covered by the our suit and who would remain in Lusardi. Although Section 7(c)(1) of the ADEA provides that filing of a lawsuit by the Secretary [Commission] terminates the right of individuals to file suits, those who have already filed may continue their actions. Thus, it is questionable whether we could not cover those who have not opted into Lusardi.

Also, although the Commission can, in the public interest obtain injunctive relief, it can only obtain individual relief, such as backpay, for those persons who have specifically opted in. Thus, we would have to go through a full notice procedure, which as previously discussed, can be quite expensive.

Since Xerox refused to provide us with the VRIF list, we have not been able to assess the interest level of those persons who did not opt into Lusardi. We do know, however, that they failed to respond to three separate notices from non-government, private counsel.

12/ This evidence, however, particularly the statistics, clearly would have to be further refined prior to an actural trial.

In sum, although direct suit is procedurally feasible, it could if pursued alone, leave us representing a group of disinterested people, with the ability only to obtain injunctive relief.

2. Intervention

Intervention in Lursardi on the termination issue only is another viable option. Even though this case was filed in March, 1983, we do not anticipate any serious problems procedurally with the intervention. The Lusardi attorneys have not as of this date embarked on any extensive discovery. Very few depositions have been taken and most of the interrogatories are still outstanding. The Lusardi attorneys told us earlier in this litigation that they would be happy to have the Commission participate in their litigation, and throughout our investigation and conciliation, they have been very cooperative in sharing information.

Because the Commission can seek injunctive relief in the public interest, we could seek to represent the former employees that have tried unsucessfully to opt into the Lusardi lawsuit or those who have not tried to join the suit at all. 13/ Since proof for these people would overlap with the proof for the existing very broad Lurardi class, our "expansion" should not cause any complex discovery problems. In fact, we could simultaneously help the Lusardi victims prove their case while pursuing injunctive relief for those not in the Lusardi class.

We must note however, that there is the possibility that the Court will limit us to the Lusardi class as a prerequisite to intervene. One way to ensure that the Commission is in a position to obtain some type of relief for all victims ultimately identified is to intervene, but if the intervention is limited, to file a second direct suit. This is similar to what was done in Cargill where we were prepared to intervene in a separate case based on sex when our initial intervention was limited to race (instead of our proposed expansion to include sex). In that instance, the Commission ultimately entered a settlement that covered both lawsuits.

In either case, if we intervene, we will have to make financial arrangements with the Lusardi attorneys. This could be a straight arrangement of a percentage of the total costs, or could be a division of costs by tasks. For example, since we have started on the statistical analysis and have an expert familiar with the case, the Commission could bear the expense of the expert witness and the computer analyses for the termination issue, with the Lusardi attorneys responsible for all other costs, including all depositions and transcripts. We believe that the statistical cost would be controlable because Xerox has all employment data computerized in clear workable data base, which we already have, and we believe that the issues in this case are fairly narrow and focused.

A presentation memorandum and draft complaint are attached as Exhibit G for your further consideration of this option.

3. Refine Our Case and Continue Conciliation

The main purpose of this option would be to continue to conciliate on a class basis. Without receiving the VRIF list, we were unable to fully identify the group of persons on whose behalf we should be seeking relief. Also, because of Xerox's delay in providing a complete computer tape, we could not identify a class statistically because we could not sort by job family.

The third set of tapes submitted by Xerox complied with our original request. These tapes will allow the Commission to contrast and compare the types of termination by groups in age bands, by locations, positions, performance ratings and salaries. The additional studies have been described in detail in the Current Status section, supra. We think the statistical case is very strong. Based on our inteviews and other documentary evidence we think these latest analyses will isolate specific areas where Xerox's liability will be exposed.

13/ Approximately 6000 employees over 40 years old were terminated and only 1300 opted into the Lusardi lawsuit.

Simultaneously with the statistical analyses we should make every effort to identify former employees who have not opted into the Lusardi lawsuit. As previously discussed, we have investigated the cost of a nationwide advertising campaign. While the cost of a full campaign is prohibitive, we believe we can reach most of the victims by advertising in the Wall Street Journal (national edition). The cost of this with a one-quarter page ad running once a week for three consecutive weeks is $56,517.

There, however, are some problems with this option. Although it would take a substantial commitment of funds to complete needed analyses in order to continue class conciliation, based on Xerox's record to date, there is no reason to believe that Xerox would cooperate with a further investigation, or that it would conciliate in good faith on a class basis at the end of such further investigation. Moreover, since the statute is no longer tolled, peoples' right to relief terminates each day we wait before filing a suit.

However, if this option is selected, we have attached as Exhibit H the necessary contracts packages (one for the statistical work, and one for the publication).

4. Conciliate Individual Claims

We must also consider Xerox's suggestion that we attempt to conciliate individual claims. However, this would be limited to the four individuals who are not represented by private counsel. (See Exhibit F) unless we secured private counsel's permission, to seek relief for the additional 85-100 victims whose claims of discrimination fall after March 31, 1983. As previously noted, although these people are not included in the Lusardi class, they have signed retainer agreements with private counsel. To date, private counsel has made inconsistent statements regarding how he intends to handle this group, having told Carlton Preston that he may move the Court for the inclusion of these persons, and Leroy Jenkins that he was not going to move for their inclusion.

Assuming that we secure counsel's permission to conciliate these claims, the backpay would be limited. Almost all of the victims were terminated with some type of pay continuance ranging from two weeks to 30 months. Thus, some of the victims may not be entitled to any backpay.

The greatest harm suffered by most of these victims is the reduction in retirement benefits. Since Xerox's potential liability on that issue in the lawsuit is enormous, it is unlikely they would in conciliation give any adjustment in retirement benefits.

We think the Commission's conciliating these few claims for nuisance value relief would have a negative impact on the Lusardi litigation, which is currently in the initial discovery stages. One problem is with anecdotal testimony in large class actions. In many instances, an interested and enthusiastic class may loose interest during the relatively long period of time such an action takes to develop. Thus, small individual settlements may discourage the class members.

A more serious problem with individual conciliation limited to claimants we have already identified is that the persons on whose behalf we would be seeking relief were not identified in any systematic manner. In fact, the bulk of them were terminated after March 31, 1983, and thus inappropriately responded to the Lusardi notice. That notice was directed to current employees and former employees discharge prior to March 31, 1983. Thus persons discharged after that date have had no notice that they may be eligible for relief. Under these circumstances, it would be unfair to other post-March 31 dischargees to exclude them from potential relief without notice.

In weighing this alternative, we must be mindful that it was Xerox's own delaying tactics and non-cooperation which has limited the number of persons we have been able to identify. Therefore, in addition to this type of piecemeal and random approach to a settlement of a systemic case being inconsistent with program goals, it rewards the respondent for its delaying and non-cooperation. While this may not be as critical in this case, since the Lusardi case does cover a substantial number of victims, we believe that it will send a signal to private industry. Xerox publicized the investigation and is likely to similarly publicize any settlement.

If it is decided to conciliate the claims with the Lusardi's counsel permission, we think there should be a pre-conciliation agreement with Xerox that the Commission would be entitled to additional discovery on each individual claimant to insure that we would be able to obtain sufficient evidence to present a make whole relief claim.

5. Fail Conciliation But Take No Further Action

Finally, we could issue a notice that conciliation has failed, and not pursue our own action or seek intervention at this time. Xerox has shown that it is unwilling to take any action which would lead to a meaningful settlement of the EEOC class claims. The consistent position of the company has been to prolong the negotiations and to attempt to reduce the negotiations to haggling over possible discrimination toward individudal employees as opposed to any type of class relief.

Since the inception of the investigation Xerox has engaged in dilatory tatics and frequently misrepresented facts to the Commission. They have been less than cooperative prior to and during the conciliation period and there is no indication that their tactics will change in the future. They have only said they are willing to discuss the individual cases of former employees if we can prove to them that these people suffered age discrimination.

Because of their considerations in the defense of the private lawsuit, their strategy and conduct in attempting to trivialize our investigation are not surprising and are unlikely to change unless they want to settle the private suit. We have attempted in this memorandum to document Xerox's failure to cooperate with the Commission throughout the investigation and conciliation period. Moreover, our efforts for the last twelve months have satisfied the statutory duty pursuant to 29 U.S.C. § 626 (b).

The following facts may support taking no action. The Lusardi lawsuit address the same issues that we seek to address, although it does not now cover everyone we would seek to cover. Even though the Commission, in the public interest could represent the VRIF claimants who did not opt into Lusardi, we note that these claimants, mostly highly educated managerial, professional and sales personnel, all had the opportunity to opt-in Lusardi and declined to do so. Therefore, there is no overwhelming damage which will occur if the Commission declines to litigate.

III. RECOMMENDATION

After considering all of the options detailed above, it is our recommendation that we fail conciliation and immediately seek litigation authority to intervene in the Lusardi lawsuit on the termination issue.

The evidence that we have obtained from the Lusardi attorneys and our evidence for the investigation indicate that Xerox systematically violated the ADEA in numerous facilities nationwide. The projected relief will be several million dollars in backpay and lost pensions and any settlement or court ordered relief will have a nationwide impact. (See EEOC v. Equitable Life Insurance, an age age case with issues similar to this one that resulted in a $13 million dollar settlement for approximately fifty victims).

We further recommend that the financial arrangement be that the Commission do the statistical work and the private plaintiffs assume all other costs. Under this arrangement, private counsel would be responsible for providing us with copies of all depositions, as well as copying and analysis of all non-computerized discovery.

Finally, if intervention is not pursued, we feel that it would be best to fail conciliation and take no further action. We believe there is ample justification for this course, and that it is preferable to obtaining small and fragmented relief for 85-100 individuals who are part of a group for which there was never formal notice.

CONCLUSION

We have attached to this memorandum, several sets of documents which correspond with the various courses of action presented. The set which corresponds with the course of action selected should be reviewed and signed, if appropriate.

We are also available for a oral presentation to answer any questions you might have.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Paul Brenner

6/25/85

MEMORANDUM

TO: Special Assistants

FROM: Allyson K. Duncan
Acting Legal Counsel

SUBJECT: Opinion Letter Request

Attached is an opinion letter request from Karen Bush Schneider, Esquire, of Foster, Swift, Collins & Coey, P.C. Ms. Schneider's law firm represents the Michigan Education Association, a labor organization. The Association wants to include in its collective bargaining agreements provisions permitting early retirement incentives under certain conditions. Ms. Schneider has requested the Commission's opinion on the lawfulness of proposed language.

We have analyzed the request in light of the criteria for issuing opinion letters and recommend that the attached letter be issued. The factual issues presented by the request are susceptible to resolution by an opinion letter. The request proposes specific language and requests the Commission's opinion on its lawfulness.

There is currently no Commission guidance on the substance of the request. The Commission has yet to publicly address the question of early retirement incentives. There is limited case law that stands for the proposition that a voluntary early retirement plan is lawful under the ADEA.

The answer to this opinion letter would provide valuable guidance to the public. The issue of early retirement incentives is of great public interest. The Office of Legal Counsel receives a substantial number of requests, both oral and written, for guidance in this area. Many companies have instituted such plans. In addition, many employees are interested in such plans.

The Commission is not engaged in any litigation that concerns the subject matter of this request. It is engaged in litigation on early retirement incentives in EEOC v. Times Mirror, Inc. and Newsday, Inc., No. 84-CIV-4692 (S.D.N.Y.) It is anticipated, however, that the Office of General Counsel will voluntarily dismiss that case. It is not known whether any charges exist involving this subject.

As noted above, there has been a great deal of interest in the whole area of early retirement incentives. Our analysis of the issue begins with the understanding that "[e]arly retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary. . . . It supports not a hint of age discrimination." Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), cert. denied 104 S. Ct. 488 (1983).

In the opinion request at issue here, the incentives will generally provide an extra payment to employees who retire prior to eligibility for full social security retirement benefits. For purposes of this letter we have assumed that employees are eligible for full social security retirement benefits at age 65. As can be seen from the letter, it is concluded that such an incentive is lawful under section 4(f)(2) of the ADEA. The same reasoning may be used to conclude that early retirement plans that waive the actuarial reduction of pension payments for early retirement are also lawful.

Not addressed in the opinion letter request is another typical early retirement incentive, the buy-out plan. Under this type of plan employees are paid a lump sum for early retirement. Generally the lump sums are highest for younger employees and decline in direct relation to advancing age. Because of this, such plans violate section 4(a) of the ADEA. However, the reasoning in the attached letter could also be used to find these types of plans lawful under section 4(f)(2). As long as the plan is bona fide and is not a subterfuge because it is voluntary, it may be found lawful.

Buy-out plans also may be found lawful under section 4(f)(1) of the Act. Section 4(f)(1) provides that:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization-

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

Plans that provide greater buy-outs for younger employees generally tie the buy-out amounts to the number of years an employee may work before he has to retire. Younger employees who retire pursuant to such a plan are giving up extra years of salary that they could earn. The employees are being compensated for foregoing these remaining years of employment by the payment of a larger buy-out. The greater payment for foregoing extra years of employment is a reasonable factor other than age within the meaning of section 4(f)(1).

This analysis does not conflict with the line of reasoning in cases such as EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied 53 U.S.L.W. 3236 (1984); EEOC v. Borden's Inc., 724 F.2d 390 (9th Cir. 1984); and EEOC v. City of Altoona, 723 F.2d 4 (3rd Cir. 1983). Those cases held that eligibility for a pension cannot be a defense to a prima facie case of age discrimination. Under this analysis, eligibility for a pension is not a factor. The sole criterion determining the amount of the buy-out is the number of years the employee has the right to work. The more years he forgoes, the greater the payment.

Westinghouse, Borden's and Altoona are also distinguishable on factual grounds. In both Westinghouse and Borden's employees were being denied a severance payment merely because they were eligible for retirement. In Altoona, employees were being forcibly retired because of pension eligibility. Under a buy-out plan, no employee is being denied a benefit or being forced to retire simply because of pension eligibility. Rather, certain employees are being provided the option to forego extra years of employment in return for a lump sum payment. 1/

Finally, the cases listed above are distinguishable because an early retirement incentive, such as a buy-out plan, is voluntary. A voluntary plan does not give an employer the power to forcibly retire older employees and therefore cannot conflict with the purposes of the ADEA. Patterson v. Independent School District #709, 742 F.2d 465, 468 (8th Cir. 1984); Mason v. Lister, 562 F.2d 343, 346 (5th Cir. 1977).

It is arguable that this analysis conflicts with 29 C.F.R. §1625.7(c) of the Commission's regulations. That section states:

> When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

On its face, a buy-out plan that gives larger payments to younger employees is using age as a limiting criterion. As already discussed, however, in actuality the plan is merely providing larger payments to employees who are foregoing more years of employment. Therefore the plans are not using age as a limiting criterion. Section 1625.7(c) is more directed at situations like Westinghouse or Altoona, where employees are either being denied a benefit or being forcibly retired because they are pension eligible.

The proposed opinion letter is attached for your review.

1/ While it is true that certain employees will not be able to receive as large a buy-out as other employees, the plan "is not vitiated by the fact that by reason of the chronological sequence of events" every employee cannot "take advantage of all its ramifications." Patterson v. Independent School District #709, 742 F.2d 465, 468 (8th Cir. 1984).

Attachment

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

June 28, 1985

MEMORANDUM

TO : Leroy T. Jenkins, Jr.
Director, LEC

THRU : Estelle D. Franklin
Supervisory Trial Attorney

FROM : Carlton L. Preston
Trial Attorney

Judy Mathis
Equal Opportunity Specialist

SUBJECT : Identification of Potential Classmember in EEOC v. Xerox Corp., ADEA Investigation/Conciliation

This memorandum is in response to your request for a sample group of identified victims in the EEOC v. Xerox investigation/conciliation. We have included a list of 7 victims who we think are good potential classmembers. The discriminatory actions taken against these employees,individually, are typical examples of Xerox's system wide treatment of employees 40 and over in violation of the ADEA. This group represents one tenth of the seventy people we have contacted. Xerox terminated approximately 5000 employees forty and over during our relevant investigation period March 1, 1980 through March 31, 1983. Currently, we have not been able to contact these employees to get their individual stories. However, from the information of our identified victims we think most of those 5000 terminated employees were affected by Xerox's discriminatory policies, and will conform to our system wide class claim of age discrimination. (Excluding the 1200 plus persons that have opted into the Lusardi litigation)

We also calculated the potential back pay for the 7 victims. The total amount was $189,624.00. This figure represents the salary at termination minus severance pay and post Xerox employment earnings. The lost insurance and pension benefits were not included in these calculations because we do not have the current information to determine the insurance loss nor the actuarial expertise to make the pension computations.

Barbara J. Gravely

Age: 55 terminated July 1983 when she was 53

Type termination: Placed in permanent lay-off when her position was moved from Ohio to Connecticut

Position: Accounting Clerk
Xerox Printing Systems
Columbus, Ohio

Hired: March 1968; she always had the same job; she had 15 years service at termination

Performance evaluation: (Printing Systems uses different format than major corp.) on last evaluation she got above average; before had been rated very high; evaluations were lower for everyone after 1981 when Xerox corporate policies were instituted.

Salary: $15,000 she got 1 year's severance pay

Reason for termination: Her job function was moved to Connecticut. She was not offered the opportunity to transfer.

Allegation of discrimination:

There were 6 accounting clerks, all of whom were over 50 except one who was 39. All accounting clerk jobs moved to Connecticut but there were other jobs left at the Columbus facility for which these clerks were qualified. The only one retained and transferred to another position was the woman who was 39 and who had the least time with Xerox. The others were not given an option to transfer into any other job or to transfer with their jobs.

The controller, who was 39 or 40, told them he chose terminees on the basis of a merit list which allegedly was not drafted by him. He refused to show them the list or to tell them the criteria upon which the list was based.

When the move was first announced in September 1982, the accounting clerks were assured some other jobs would be found for them.

Total Back Pay - 2 years at $15,000 minus 1 year severance pay (full salary) plus insurance premiums approximate total claim $15,00 plus interest.

John C. Hopkins

Age: 45; terminated March 24, 1982

Type of termination: He voluntarily terminated, with severance pay when a involuntary termination was suggested as the only other option.

Position: Buyer Electro Optical Systems Purchasing Department

Pasadena, California

Hire date: March 24, 1980

Position: Buyer

Mr. Hopkins said that his performance ratings were always at least 3 level. He believes that performance had very little to do with termination. At his facility everyone knew that the older higher salaried employees would be the first to be Riffed and that Xerox initially made no secret of that fact. He knew of two vacant buyer positions in which he qualified prior to his RIF. The jobs were filled by less experienced younger.

He received three months full salary and benefits as severance pay. His salary at termination was approximately $26,000 per year.

Allegations of Discrimination:

Mr. Hopkins asked his manager Robert Francis, about his situation, when he heard that his office was targeted for a Rif. Francis told him he had nothing to worry about. Approximately 30 days later he was Riffed. Before he left, he managed to get two interviews for jobs but was not successful. However, he did find out that a young white female, Deby Brotherlon, an inexperienced expediter, was promoted to a buyer position at the time he was being terminated. Mr. Hopkins also believed that Xerox maintained a subtle dislike for him after he filed race discrimination charge to get promoted, earlier in his tenue at Xerox.

Total Back Pay: 2 years and 9 months at $26,000 per year, plus interest; minus any salary made from March 24, 1982 through April 19, 1985.

Total Claim: $51,494.00

James Bovitz

Age: 54; terminated April, 1980 when he was 52

Type of Termination: Bridge to Retirement "voluntary" retirement

Position: Business Analyst
Reprographic Manufacturing Group
Division Finance Office
Rochester, New York

Hired: April 1973 (10 years service) always worked in RMG Finance

Performance evaluation: Always high 3's, got 4's from his immediate supervisor

Salary: $35,000
recieved 15 months full salary continuance
found another job after 6 months at $32,000

Reasons for termination:

Bovitz was told by his manager, in his late 30's, that a decision had been made higher up to terminate Bovitz if he did not take the Bridge to Retirement offer.

Allegation of Discrimination:

It was announced that Bovitz' section had to reduce its head count by 3. The two others who left, both younger, transferred back to their former units. Though others in his group had as much tenure, Bovitz was the oldest in the group and the only one to be forced to leave. Bovitz implemented the accounting systems used by the group. He knew of several other openings around the country that he was qualified to fill. When he asked about moving into one of the jobs he received no response from personnel. He was replaced by a man in his early 40's with 9 years service. Xerox was hiring young recent college graduates into the finance department before and after his termination.

Total Back Pay:

26 months at $35,000 per year minus 15 months salary which he received as severance pay, minus the amount he has made at his new job which began 6 months after termination approximate total claim $7072 plus interest.

Joseph Bartell

Age: 59; terminated June 30, 1983 at age 57

Type termination: "voluntary" retirement

Position: Manufacturing Engineer
Reprographic Manufacturing Division
Rochester, New York

Hired: November 1969 (almost 14 years of service at termination) always worked as engineer in that division.

Performance evaluation: 3's for the 3 years prior to termination. In 1982-83, just before termination, got promotion in grade and 14.3% raise. In 1980-81 he got a salary increase award for good performance.

Salary: $36,30

He received 15 months full salary continuance and insurance during the period.

Reason for Termination:

His mamager, Mike Wierzbike, approximately 38 years old, told him that if he did not voluntarily retire he would be involuntarily terminated in the RIFs which were scheduled to take place in July and November of 1983.

Allegation of age discrimination:

Bartell had the longest service time of any of the 7 engineers in his group. There was one older engineer, who is a senior group leader and is still there. However, there were 5 engineers in his group, all under 40, none of whom, to Bartell's knowledge, got higher than a 3 performance rating and none of whom left or were terminated. For example: Andy Horling was 26 with 2 years service but was not terminated. (Note: this employee could be in the same matrix cell as Bartell as a result of the way the matrix was designed) Bartell saw the older workers all around being terminated. He saw that others who resisted voluntary RIF were soon terminated involuntarily.

After termination:

No job openings within Xerox were posted at the time of his Rif.

Total Back Pay

24 months at $36,300 per year, minus 15 months salary continuous; approximate total claim $27,225 plus interest.

Robert Cameron

Age: 60; 58 at termination in July, 1983

Type of termination: Retirement

Position: Engineer, Divisional Industrial Engineering
North American Manufacturing
Reprographic Manufacturing Group
Rochester, New York

Hired: 1970 - 13 years service at termination

Performance evaluation: always 3 or above

Salary: $37,000 - got 1 year's severance pay

Reason for termination:

He was told to take early retirement or he would be indefinitely laid off with no severance benefits.

Allegation of discrimination:

5 other engineers in his department had less service and were between 28 and 45. He was told the lay-off would not be by seniority. The only people terminated were Cameron and another man 59 to 61 with about 17 years service. Three other younger engineers were transferred to other positions within Xerox and their relocation was paid for by the Company.

Cameron offered to take a lower paying position and was told nothing was available. He offered to take a job on a temporary project in Toronto which he had started but his request was never answered.

Total Back Pay

24 months at $37,000 minus 12 months' severance pay, approximate total claim - $37,000.

James Crayton

Age: 54; terminated April 1983 when he was 52

Type termination: Bridge to Retirement - got 1/2 salary for
24 months

Position: Educational writer - Xerox Educational
Publications, Middletown, Connecticut

Hired: July 1969 - 15 years service when terminated

Performance evaluation - last three years - 3

Salary: $38,000

Reason for termination:

He was told by the Personnel Director that if he didn't take the Bridge to Retirement program he would be terminated as an involuntary RIF.

Allegation of discrimination:

There were 15 writers in his department, seven of whom were younger than he was and all had less time with Xerox. He was the only one to be terminated at that time, he thinks, because his salary was higher than those other men around his age. He thinks several of those men around his age have since left.

Total Back Pay

26 months at $38,000 year minus 12 months' severance pay; approximate total claim $44,333.

Norman Fertig

Age: 59; demoted in July, 1983 when he was 57.

Demoted and has continually been denied promotion. (Note: we have made a tentative decision to focus on terminations in any future litigation. That decision would not preclude conciliating on behalf of this person, whose cause of action arose after the Lusardi class period closed. Our letter of violation would cover demotion and denial of promotion)

Position: Manager of Srategic Planning
Refurbishing Area
Reprographic Manufacturing Group
Rochester, New York

Hired: 1963

Performance evaluation: 4 in 1983

Salary:

$60,000. Though his salary was not reduced he has lost the raises he would have gotten in the past 2 years, about 6% total.

Reason for demotion:

Reduced from grade 13 to grade 12 was told position was being downgraded but he would be promoted back to grade 13 at first opening; responsibilities of position were also diminished.

Allegation of discrimination:

Fertig alleges Xerox is trying to get older workers to leave by putting them in dead end spots and having them work for people who used to be their subordinates. Since his demotion, the job above him, Manager of Technical Services, grade 13, has been open 3 times. He asked for the job each time but believes he was not considered because of his age. All those promoted to this job have been younger and with less time at Xerox.

Total Back Pay

He has not lost salary; has lost raises he would have received had he not been demoted which would total about 6% in 2 years approximate total claim - $7,500

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

July 18, 1985

return to —
Paul Brenner

MEMORANDUM

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred W. Alvarez, Commissioner
R. Gaull Silberman, Commissioner

THRU : Johnny J. Butler
General Counsel (Acting)

FROM : Philip B. Sklover
Associate General Counsel

RE : Recommendation Against Litigation--
Chappaqua Central School District
Charge No. 021-84-0139

REJECTED
MOTION NOT TO
LITIGATE APPROVED
BY COMM., 9/10/85.
AGST. LITIGATION —
THOMAS, WEBB, SILBERMAN
FOR LITIGATION —
GALLEGOS, ALVAREZ

The Office of the General Counsel recommends against litigating this ADEA policy case, submitted by the New York District Office.

The case involves Respondent's collectively bargained "Early Retirement Adjustment Allowance Plan" for teachers, which was implemented in 1977 and which evidently still remains in effect. At the outset, it is important to note that participation in the early retirement incentive plan is strictly voluntary; that is, teachers who do not wish to take early retirement may continue working until mandatory retirement at age 70 (age 65 prior to January 1, 1979).

When the Plan was first introduced in 1977, "[a]ll full-time members of the teaching staff who ha[d] attained age 55 [were] eligible for the [retirement incentive] benefits." See Respondent's memorandum to "Members of the Professional Staff," dated November 17, 1977, in the Presentation Memorandum file. Thus, participation in the Plan was effectively open to all retirement-eligible employees, including those who attained age 65. All those who participated in the one-time-only general offering received 40% of their 1977-78 annual base salaries when they retired in June 1978.

However, participation was thereafter limited to teachers aged 55 through 61: those aged 62 or older received no retirement incentive. See Article XVIII.J of Respondent's 1979-84 collective bargaining agreement, at page 24, in the PM file. Under that agreement, all participants received a lump-sum cash payment "as of the date of their elected retirement from and termination of employment in" the Respondent school district. "The amount of benefits, ... according to age at effective date of resignation," was as follows (see PM, IV.1 at page 4):

Age at Retirement	Percentage of Final Salary
55 - 56	40%
57 - 59	20%
60 - 61	10%
62 or older	0

The Charging Party was born on December 3, 1913 (see charge), and was already eligible for retirement when Respondent first introduced its early retirement incentive plan in 1977. Accordingly, she could have elected to retire in June 1978; and, if she had retired, would have received the maximum retirement incentive of 40% of her annual base salary for 1977-78. By June 1979, Charging Party was no longer eligible to receive any retirement incentive, because she was then age 65. Indeed, Charging Party did not retire until April 30, 1983, when she was age 69. On October 19, 1983, she filed an ADEA charge alleging that she had been denied any retirement incentive benefits.

Statute of Limitations Issue

Respondent's first contention is that, since its Plan was introduced in 1977 and has not been changed since 1979, any claims on behalf of Charging Party (or other similarly situated individuals) are beyond the maximum three-year limitations period on ADEA violations.* See Respondent's Position Statement at pages 9 - 11. Under Respondent's theory, of course, an employer would be forever free to continue an on-going and unlawful employment practice if that practice went unchallenged during its first three years of existence.

Respondent's theory has been rejected in the ADEA retirement-plan context by many courts, including the Second Circuit where this proposed lawsuit would be filed. See O'Malley v. GTE Service Corp., 758 F. 2d 818, 821 (2d Cir., 1985): "The [so-called] Ricks-Chardon rule [developed under Title VII by the Supreme Court] need not be applied so rigidly as to require an employee to file an age discrimination charge [or lawsuit] when the employee first learns of a discriminatory plan, even though the employee's own retirement date may be . . . years away. A literal application of the rule could mean that the [ADEA] statute of limitations would begin to run the day the employee started to work, an obviously undesirable result."

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* In the same vein, Respondent contends that Charging Party failed to timely file her ADEA charge within 300 days after the alleged act of discrimination in 1977 or 1979. However, the supposed absence of a timely charge is no impediment to the Commission's ability to sue under the ADEA, provided that the discrimination occurred within two or three years before the date of the EEOC's lawsuit. See EEOC v. State of Kansas, 29 EPD para. 32,725 (D. Kan., 1982); EEOC v. Roadway Express, Inc., 33 EPD para. 34,265 (E.D. N.C., 1981); and, EEOC v. Sperry-Univac Corp., 36 EPD para. 35,019 (D. Utah, 1982).

In the instant case, OGC believes that the statute of limitations did not begin to run on Charging Party's claim for the retirement incentive benefits until she retired on April 30, 1983. Not only is that claim still within the maximum three-year limitations period on willful ADEA violations, but also well within the two-year period on non-willful violations (by virtue of tolling for one year during EEOC's unsuccessful conciliation efforts). See PM, II.1 at page 2. Moreover, insofar as Respondent's on-going implementation of the Plan is concerned, the alleged ADEA violations are "continuing" in nature as to each newly retiring "aggrieved" teacher.

The Alleged ADEA Violations

On its face, Respondent's Plan provides a lesser benefit to retiring employees aged 57 - 61 than it does to similarly situated employees aged 55 - 56. Likewise, on its face, the Plan fails to provide any benefit whatsoever to retiring employees aged 62 or older. Accordingly, OGC believes that Respondent's Plan violates Section 4(a) of the ADEA which, among other things, makes it unlawful for employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" (29 U.S.C. 623(a)).

However, the ADEA provides certain exceptions to the prohibitions of Section 4(a). Thus, Section 4(f)(2) of the ADEA provides that "[i]t shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of th[e ADEA], except that no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual [aged 40 - 69] because of the age of such individual" (29 U.S.C. 623 (f)(2)).

Under established Second Circuit caselaw, "[t]he Section 4(f)(2) defense has three elements: (1) there must be a bona fide [employee benefit] plan, (2) the action must have been taken in observance of its terms, and (3) the retirement [or other employee benefit] plan must not have been a subterfuge to evade the purposes of the ADEA." EEOC v. Home Insurance Co., 672 F. 2d 252, 257 (2d Cir., 1982), and the cases there cited. OGC believes that each of those elements is satisfied by Respondent's Plan in this case.

First, Respondent's Plan is "bona fide" in the accepted sense that the "[P]lan" exists and pays substantial "employee benefit[s]," thus qualifying as a "bona fide employee benefit plan" within the meaning of ADEA Section 4(f)(2). Second, it is undisputed that Respondent always "observe[d] the terms" of that Plan, as required by Section 4(f)(2). Third, there is nothing in the record to even suggest that Respondent intended to use its Plan as "a scheme, plan, stratagem, or artifice of evasion." United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977) (construing the term "subterfuge" in Section 4(f)(2) of the ADEA).* It would appear, therefore, that Respondent's Plan qualifies for the Section 4(f)(2) exception.

Under interpretive guidelines issued by the Department of Labor, and adopted by the Commission on an "interim" basis, the Section 4(f)(2) exception applies to employee benefit plans in which age is a significant cost consideration. See 29 CFR 860.120(a): the "purpose" is "to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." For example, the guidelines permit an employer to reduce life insurance coverage or benefits based on any significant age-related cost consideration of life expectancy. 29 CFR 860.120(f)(1)(i). Similarly, OGC believes that it is lawful for an employer to reduce employee benefits based on any significant age-related cost consideration of "working-life expectancy." In either instance, the particular life expectancy can be reasonably determined on an actuarial basis, as authorized by the guidelines. See 29 CFR 860.120(d)(1).

In this case, OGC believes that Respondent's schedule of benefits is probably related to the working life expectancy of its employees: i.e., a percentage of the employees' anticipated future earnings, using the actuarial assumption of retirement at age 62 when Social

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* It is anticipated that the Commission will soon consider a staff proposal to issue an opinion letter taking the position that a truly voluntary retirement incentive plan cannot be "a subterfuge to evade the purposes of the Act." See memorandum, from Allyson K. Duncan to Special Assistants, June 25, 1985, re Opinion Letter Request from Karen B. Schneider, on behalf of the Michigan Education Association. Applying the proposed opinion to this case, OGC believes that Respondent's voluntary Plan simply cannot be a subterfuge to evade the purposes of the ADEA--especially the Section 4(f)(2) purpose of prohibiting "involuntary retirement" because of age. In this regard, it is important to note that two courts have already upheld similar retirement incentive plans against ADEA challenges, relying on the voluntary nature of participation in the plans. Patterson v. Independent School District #709, 742 F. 2d 465, 468 (8th Cir., 1984); Cipriano v. Board of Education of the City of North Tonawanda, not reported (W.D. N.Y., No.Civ-84-80C, Apr. 2, 1985), appeal docketed (2d Cir., No. 85-7366, May 6, 1985)--copies attached.

Security "Old Age" benefits first become available. OGC therefore believes that Respondent's "Early Retirement Adjustment Allowance Plan" is lawful by virtue of the exception provided in Section 4(f)(2) of the ADEA.*

If you have any questions regarding this case, please contact Paul Brenner of Trial Services, at 634-6595.

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* In considering this case for litigation, it should be noted that an EEOC action involving an analogous voluntary severance or buy-out plan was recently dismissed, because OGC had concluded that the plan at issue was lawful under Section 4(f)(2) of the ADEA. See EEOC v. Times Mirror, Inc. and Newsday, Inc., S.D. N.Y., No. 84-Civ-4692, filed July 5, 1984, stipulation of dismissal entered June 12, 1985. In that case, the employees were offered various cash and non-cash benefits to voluntarily terminate their employment. The schedule of benefits may be summarized as follows:

Age	Percent of Annual Earnings	Fringe Benefits
<61	225 %	5 years
61	200 %	4 years
62	175 %	3 years
63	125 %	2 years
>63	75%	1 year or to age 65

The defendants claimed that the benefits schedule was related to the working-life expectancy of its employees: i.e., a percentage of each employee's anticipated future earnings. In this regard, defendants' persuasively demonstrated that the length of time that any age-group of employees will work before dying or electing to retire can be determined on an actuarial basis using past work experience. For example, it is known that employees typically retire in great numbers at age 62, when first eligible to receive Social Security "Old Age" benefits; and, again at age 65, when eligible to receive unreduced Social Security benefits. Because defendants' buyout plan was based on such actuarial assumptions and on past workforce experience, OGC concluded that the plan fell within the "employee benefit plan" exception to the ADEA. Because those same conclusions appear to apply with equal force to Respondent's Plan, OGC cannot concur in the recommendation to litigate the instant case.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
264-7161

June 21, 1985

MEMORANDUM

FROM: ROBERT L. WILLIAMS
Regional Attorney

SUBJECT: Presentation Memorandum in EEOC v. Chappaqua Central School District
Charge No. 021-84-0139

TO: JOHNNY BUTLER
General Counsel

THRU: PHIL SKLOVER
Associate General Counsel
For Trial Services

Enclosed please find the following for the above referenced case:

1) Presentation Memorandum
2) Letter of Violation
3) Letter requesting conciliation
4) copy of charge

If there should be any questions, they can be directed to Ann Anderson Thacher, Senior Trial Attorney at FTS- 264-7188.

6/26/85
CALLED ANN ANDERSON.
REQUESTED COPY OF
RESPONDENT'S POSITION
STATEMENT AND ANY
SUPPORTING DOCUMENTS
CONCERNING R'S
EARLY-RETIREMENT
INCENTIVE PAY PROGRAM.

PRESENTATION MEMORANDUM

I. Introductory Information

1. **Statute:**	ADEA. This is an ELI Case.
2. **Parties:**	
a. Respondent:	Chappaqua Central School District
b. Defendant:	Same
c. Charging Party:	Edith M. Scott

3. Nature and Scope of the Proposed Suit

The issue in this case is whether respondent violated the ADEA on April 30, 1983 by offering as a retirement incentive a lump sum payment based upon final salary and varying with age, as follows:

Age at Retirement	Percentage of final salary
55 - 56	40%
57 - 59	20%
60 - 61	10%
62 - and over	0

This suit would be on behalf of the Charging Party and 11 other teachers who were too old at retirement to obtain the maximum lump sum.

4. Case No.:	021-84-0139
5. Location of facility:	Chappaqua, N.Y. 10514
6. Size of work force:	More than 20; precise number unknown.
7. SIC code:	

8. Nature of Respondent's Business: Public School System

II. Administrative Record Narrative/Jurisdiction

1. Case Processing Chronology

a. Date Charge Filed:

October 19, 1983

b. Deferral/Referral History:

Referred to New York State Division of Human Rights on November 3, 1983

c. Date of decision or determination

Letter of violation mailed March 6, 1984

d. Date of notification of conciliation failure:

On March 29, 1985 respondent was given until 5 P.M. April 12, 1985 to execute a waiver of the statute of limitations and schedule a meeting for purposes of conciliation, the alternative being a failure of conciliation efforts.

On April 23, 1985 (10 days after that deadline) respondent, although professing willingness to engage in conciliation efforts, refused to execute the waiver.

e. EPA and ADEA cases

(1) Summary of findings

Respondent violated ADEA § 4(a)(1) by offering older workers lower retirement incentive benefits than those offered younger workers in the protected age group.

(2) Conciliation efforts

On May 17, 1984 representatives of EEOC met with representatives of respondent as part of the conciliation process. EEOC spelled out the relevant requirements of the ADEA, the details of the specific violation, and the relief requested.

On July 23, 1984 EEOC sent respondent a letter confirming the details of the concililation conference.

Thereafter, respondent postponed, delayed and neglected responding to EEOC's efforts at conciliation.

f. Jurisdiction

The discrimination took place on April 30, 1983. The discrimination was willful. The three-year statute of limitations applies, tolled from March 6, 1984 to March 5, 1985. A complaint filed on or before April 30, 1986 would be timely.

2. Comparative scope of decision/determination and suit:

a. Charge

1. Basis: Age discrimination

2. Issues: Age-based differences in retirement incentives.

3. Facilities: Respondent's facilities in Chappaqua, N.Y.

b. Unalleged but decided: N/A

c. Proposed suit

Basis - same

Issues - same

Facilities - same

d. Additional issues: whether (as EEOC will claim) Respondent's discrimination was willful.

e. Poster failure: N/A

III. Other related action

1. Contract compliance check: N/A
Affirmative action plans: N/A

2. Other suits against Respondent
None raising issues here presented

3. Pending Charges: None raising issues here presented

IV. Proof

1. Factual and legal analysis

The theory of proposed litigation is disparate treatment because of age with respect to compensation, terms, conditions or privileges of employment in violation of ADEA § 4(a)(1), and publication of written notices relating to employment which discriminate on the basis of age, in violation of ADEA § 4(e).

On April 30, 1983 respondent offered its teachers as a voluntary retirement incentive a lump sum payment based upon final salary varying inversely with age as follows:

Age at Retirement	Percentage of final Salary
55 - 56	40%
57 - 59	20%
60 - 61	10%
62 and over	0%

Twelve teachers, including the charging party, retired on terms less favorable than the terms offered teachers under 57. The proof of the prima facie case is the terms of the retirement incentive plan itself.

Respondent will raise the following defenses:

a. BFOQ and business necessity;

b. The exception in ADEA § 4(f)(2) for a bona fide employee benefit plan;

c. The voluntary nature of the retirement incentive plan.

d. The North Tonawanda decision

These defenses can be rebutted:

a. Age is not a BFOQ in this context. Retirement incentives can be offered without differentiating on the basis of age between teachers in the ADEA protected age group - - - for example, by setting a flat rate of benefits applicable to all teachers eligible for retirement, or by linking the benefit rate to some extraneous factor such as performance ratings.

b. The defense under ADEA § 4(f)(2) is not available to Respondent. The retirement incentive is not an employee benefit plan within that provision but a one-shot payment. Respondent would not be able to show that the cost of providing the same benefit to older teachers and younger teachers alike would be higher with respect to older teachers than with respect to younger teachers. Age is not an actuarially significant cost factor. See generally 29 C.F.R. § 860.120 (1979); see also EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984).

c. The fact that the retirement incentive was voluntary ought not to shield respondent from the ADEA. Voluntary or not, it necessarily affected the career planning of every teacher to whom it was offered, and thus constituted a term, condition or privilege of employment as to which age based discrimination is forbidden. See Arizona Governing Committee v. Norris, 32 E.P.D. ¶ 33,696 n. 10 (1983) (voluntary deferred compensation plan offering lower benefits to women than to men held bad under Title VII).

Furthermore, apart from conciliation or settlement, a worker's voluntary relinquishment of wage payments under FLSA does not bar the worker from subsequent suit to obtain those payments. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945). It follows under ADEA § 7(b) that voluntary acceptance of a discriminatory retirement incentive does not bar a subsequent action under the ADEA.

To date, no decisions under the ADEA have addressed age based differentials in retirement incentives. The EEOC has ruled against such differentials. See Question No. 20 Directives Transmittal 904-35, dated May 29, 1981.

The case appears appropriate for summary judgment. The violation is willful. Respondent drafted the retirement incentive to have the effect of denying to teachers over 56 the benefits provided to teachers 55 and 56, and therefore violated the ADEA intentionally.

d. In Cipriano v. Board of Education, North Tonawanda, the District Court for the Northern District of New York held that a retirement incetnive plan favoring younger teachers did not violate the ADEA. However, that case is now on appeal.

V. Laches

No difficulty is anticipated. Only six months elapsed between the filing of the charge and the letter of violation. Conciliation efforts moved forward promptly but were stalled by respondent.

VI. Impact

1. Back pay and other relief.

   $136,809.30 for 12 people plus liquidated damages or prejudgment interest.

2. Cost of litigation

   Minimal because of potential for summary judgment

3. Additional reasons for recommending suit

   This case may the first of its kind in this circuit. The decision may have precedential value.

VII. Jury Trial Demand

The complaint demands a jury trial but the case may be disposed of by summary judgment.

VIII. Conclusion and recommendation

The case presents a clean issue of law appropriate for summary judgment. No major litigation hazards are anticipated. On that basis we recommend approval of litigation.

Equal Employment Opportunity
Commission

Robert L. Williams
Regional Attorney

Ann Thacher Anderson
Ann Thacher Anderson
Senior Trial Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

CHAPPAQUA CENTRAL SCHOOL DISTRICT,
Defendant.

Civil Action No.

COMPLAINT

JURY TRIAL DEMANDED

DRAFT FOR REVIEW ONLY

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful discrimination as to age and to make whole employees and retired employees aggrieved by such discrimination. Plaintiff alleges that on or about April 30, 1983 defendant offered to its teachers as a retirement incentive a lump sum payment based upon final salary and varying inversely with age, as follows:

Age at Retirement	Percentage of Final Salary
55 - 56	40%
57 - 59	20%
60 - 61	10%
62 and over	0%

Plaintiff further alleges that by offering to its teachers a retirement incentive varying inversely with age, defendant discriminated against employees, because of their age, in terms, conditions and privileges of employment.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq. (the "ADEA"), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 216(c), 217.

2. The unlawful employment practices alleged below were and are now being committed within the Southern District of New York.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission, is an agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92. Stat. 3781, and by Public Law No. 98-532 (1984), 98 Stat. 2705.

4. At all relevant times, defendant, Chappaqua Central School District, has continuously been and is now an agency or instrumentality of the Village of Chappaqua which is a political subdivision of the State of New York.

5. At all relevant times, defendant has continuously been and is now an "employer" within Section 11(b) of the ADEA, 29 U.S.C. § 630(b).

CONCILIATION

6. Before institution of this lawsuit, plaintiff's representatives attempted to eliminate the unlawful discrimination hereinafter alleged and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

STATEMENT OF CLAIMS

7. Since at least April 30, 1983 defendant has willfully engaged in and is continuing willfully to engage in unlawful discrimination, in violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a), by offering to its teachers a retirement incentive varying inversely with age.

8. The effect of the practices complained of above has been willfully to deprive teachers employed by defendant and over the age of 56, including Edith Scott, the Charging Party herein, of equal employment opportunities and otherwise adversely affect their status as employees or retired employees, because of age.

PRAYER FOR RELIEF

Wherefore, plaintiff respectfully requests that this Court:

A. Grant permanent injunction enjoining defendant, its officers, successors, assigns and all persons in active concert or participation with them from engaging in any employment practice which discriminates because of age.

B. Order defendant to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals protected by the ADEA and which eradicate the effects of defendant's violations of the ADEA.

C. Grant a judgment requiring defendant to pay appropriate back wages and an equal amount as liquidated damages (or prejudgment interest in lieu thereof) to individuals adversely affected by defendant's violations of the ADEA, including but not limited to Edith Scott.

D. Order defendant to make whole individuals adversely affected by defendant's violations of the ADEA by providing the affirmative relief necessary to eradicate the effects of those violations.

E. Grant such further relief as the Court deems just and proper in the public interest.

F. Award plaintiff its costs in this action.

JURY TRIAL DEMAND

Plaintiff requests a jury trial of all questions of fact raised by the pleadings.

Respectfully submitted,

JOHNNY J. BUTLER
General Counsel (Acting)

ROBERT L. WILLIAMS
Regional Attorney

ANN THACHER ANDERSON
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
New York District Office
90 Church Street
New York, New York 10007
(212) 264-7188

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 8, 1985

MEMORANDUM

DRAFT

TO : James H. Troy
Director
Office of Program Operations

THRU : James N. Finney
Director
Systemic Programs

FROM : Leroy T. Jenkins, Jr.
Director
Legal Enforcement &
Coordination Division

SUBJECT : EEOC v. Xerox Corporation Status Memorandum

We are currently preparing a potential conciliation package for approximately 70 identified victims, terminated by Xerox during the RIF period of March 1, 1980 - March 31, 1983. During this period Xerox terminated approximately 5000 employees over 40 years old. Our investigation indicates that a substantial number of these employees were terminated in violation of the ADEA. Since the issuance of the Letter of Violation on April 19, 1984, we have made every effort to identify these terminated employees. We have requested Xerox to supply us with a list of names, addresses and telephone numbers of these terminated employees but they have refuse Without their cooperation it has been an extremely slow and laboriou task trying to identify these employees. Simultaneously, with our attempt to identify the remaining terminated employees, we are doing detail follow up contacts with the 70 identified victims.

27,089. avg
per person

We have taken a randon sample of seven of the identifed victims and calculated their potential backpay based on our current information. The total amount for the seven victims is $189,624.00. This amount represents the salary at termination minus severance pay and post Xerox employment earnings. The loss insurance benefits were not included in these calcualtions because we would need sensitive information from Xerox and releases from the victims. The pension benefits were not included because a professional actuary is necessary to calculated the actual losses. We believe that at this point it would be an unecessary waste of time and expense to proceed with the insurance and pension calculations before we have firm commitment from Xerox that they will provide full relief for each identified victims. Assuming that the remaining 63 identified victims are similar situated in loss of pay and benefits the projected total backpay will be $11,946,312.

x.63 =

We are continuing our efforts to identify and contact as many victims as possible to present to Xerox for conciliation, provided that they are willing to conciliate all of the terminated victims that were adversely affected by violations of the ADEA in their terminating policies.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

True copy

AUG 12 1985

MEMORANDUM

TO : James H. Troy, Director
Office of Program Operations

THRU : James N. Finney, Director
Systemic Programs

FROM : Leroy T. Jenkins, Jr., Director
Legal Enforcement and Coordination Division

SUBJECT : EEOC v. Xerox Corporation

During the period of 1980-1983, Xerox terminated approximately 12,000 salaried employees. About 5,000 or 42% were above the age of 40, with the bulk being around 52 years of age. During that time PAG's represented approximately 34% of Xerox. A large percentage of the terminations of these identifiable individuals left the company under a constructive discharge. The Company contends these individuals retired under a benefits plan offered by the Company. However, interviews with more than 75 of these individuals reveal that they were given an ultimatum - i.e., take the benefits package or be terminated. Rather than be terminated, many people chose the benefits package. Moreover, internal memoranda disclosed during the investigation support our finding that age was a factor in the Company's staff reduction efforts.

Of the total of approximately 5,000 people who were above the age of 40, one-third have opted into a private lawsuit. Another 70 people were brought to our attention by the private litigants. These 70 people fell outside of the scope of the class as defined by the Court. Their claims are still timely, and now the Commission is their only representative.

We are currently preparing a conciliation proposal for these 70 people. Xerox has indicated a clear willingness to attempt conciliation of these 70 people. We have contacted and interviewed each of them, and they support our findings of an ADEA violation.

The proposed conciliation package will be forwarded to Xerox shortly. If you have any questions, please contact me.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

Best draft

MEMORANDUM **PURPOSE: ACTION**

TO: CLARENCE THOMAS
Chairman

R. GAULL SILBERMAN
Vice-Chairman

TONY E. GALLEGOS
Commissioner

FRED W. ALVAREZ
Commissioner

FROM: WILLIAM H. NG
Deputy General Counsel

SUBJECT: Brief in Intervention in Cipriano v. Board of Education of the City School District of the City of North Tonawanda, No. 84-CV-80C (W.D.N.Y.)

INTRODUCTION AND SUMMARY

As you know, the issue in this case is whether the North Tonawanda School Board and teachers' union violate the Age Discrimination in Employment Act (ADEA) by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Second Circuit Court of Appeals last year reversed the entry of judgment for the School Board and remanded the case for further proceedings. Cipriano v. Board of Education of the City School District of the City of North Tonawanda, 785 F.2d 51 (2d Cir. 1986). 1/

The appellate court ruled, in the absence of any dispute,

1/ Copies of the district court and appellate court opinions are attached.

that the plan violated §4(a)(1) [2] of the Act, 29 U.S.C. 623 (a)(1), because it withheld an employment-related benefit on the basis of age (785 F.2d at 53). On the question of whether the plan was protected under §4(f)(2), [3] 29 U.S.C. 623 (f)(2), the court ruled that the plan was "bona fide" and that it was the type of "employee benefit plan" which §4(f)(2) shelters. The only issue to be decided by the lower court on remand is whether the School Board can additionally prove, as is required under §4(f)(2), that the plan is not a subterfuge to evade the purposes of the ADEA. On this issue, the Second Circuit directed the district court to "seek the assistance of the EEOC" with respect to the meaning of "subterfuge" in §4(f)(2) as amended, or with respect to "the permissible means of structuring voluntary retirement plans." 785 F.2d at 59.

We advised you earlier that the district court, in accordance with the Second Circuit's mandate, requested the

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[2] Section 4(a)(1) provides that:

> It shall be unlawful for an employer
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.

[3] Under §4(f)(2):

> It shall not be unlawful for an employer. . .
> or labor organization -
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act. . . .

Commission to participate in the proceedings on remand. The court has now made clear that it wishes our participation to take the form of intervention, and is awaiting our response. In light of the fact that both the Second Circuit and the district court have specifically requested the Commission's assistance and in light of EEOC's role as interpreter and enforcer of the Age Act, we are recommending intervention [4] under Fed. R. Civ. P. 24(b)(2) and have prepared this memorandum setting forth the arguments which should be made to the court.

Based upon our review of the law, the ADEA legislative history and the administrative interpretations which are still in effect, we recommend that the Commission's brief present the following analysis. First, genuinely voluntary, early retirement incentives may peacefully coexist with the ADEA. Under established Supreme Court precedent, an incentive plan is in *prima facie* violation of §4(a)(1) only where, as here, it is structured in such a way as to deprive older workers of the incentive benefit on the basis of their age. However, there are various types of incentives --e.g., a lump sum to all retirement-eligible employees irrespective of age, or devices that make younger employees eligible for pension benefits--which do not collide with §4(a)(1) at all.

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[4] Although Trial Services recommended against litigation challenging the North Tonawanda Plan in December 1985, before the case went up on appeal, that recommendation was based on the assumption that the legal issues were similar to those in another case, *Chappaqua Central School District*, which Trial Services had advised against litigating. In *Chappaqua*, however, the challenged incentive bonus gradually decreased until there was a cut off at age 62, when the employees became eligible for Social Security, and OGC believed the respondents might be able to prove an age-related cost justification for the discrimination. As we demonstrate later, that is not true here. The Second Circuit's decision in *Cipriano*, moreover, indicates that courts are uncertain whether employers must provide any age-related cost justification for withholding equal benefits from older workers on the basis of age.

Second, plans that do provide unequal benefits because of age are immunized from attack by virtue of §4(f)(2) only where the cost of providing the benefit increases directly as a function of age. Put simply, the legislative history makes clear that Congress considered plans paying unequal benefits to be a "subterfuge to evade the purposes of the [ADEA]," within the meaning of §4(f)(2), unless the cost of providing the benefit increased with age. This conclusion necessarily follows from the longstanding interpretation of §4(f)(2) set forth in the regulations promulgated by Department of Labor in 1969 and ratified by the Congress in 1978, 1982 and 1986.[5] It is also the position the General Counsel has consistently advocated before the courts of appeals. See briefs in EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); EEOC v. Westinghouse, 725 F.2d 21 (3rd Cir. 1983),

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[5] Those regulations, which the Commission has continued in effect, have always provided that differential benefits are lawful only where the employer proves that the disparity is justified by age related cost considerations. 29 C.F.R. 860. 120(d).

cert. denied, ___ U.S. ___, 105 S.Ct. 92 (1984); EEOC v. Cargill, No. 84-2692 (10th Cir. filed May 31, 1985); Betts v. Hamilton County, et al., No. 86-3676 (6th Cir., filed Jan. 6, 1987); EEOC v. State of Maine, No. 86-2022 (1st Cir. filed Jan. 30, 1987).

Applying this principle here, we conclude that the School Board will probably be unable to prove that its incentive plan is justified by age-related cost considerations. Withholding a fixed incentive bonus from employees beyond age 60 cannot be justified on the ground that the employees' age renders extension of the incentive to them more costly. Such a plan, therefore, reduces to a "subterfuge" because it arbitrarily denies them a benefit and also because it operates to pressure employees to exit the work force before they reach age 61, in contravention of the ADEA's goals.

Although the court of appeals held that the plan in this case violated §4(a)(1), we explicate the analysis of that section here as a framework for discussing the fact that not all incentive plans violate §4(a)(1). The memorandum then discusses the separate elements of the §4(f)(2) defense. 6/ The brief in

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6/ This memorandum pertains only to the issue raised by the particular facts of the North Tonawanda incentive and does not purport to broadly settle the issues which may arise in other incentive cases. The Commission may wish to consider further regulatory guidance in the area although Legal Counsel suggests that regulations may be inappropriate because §4(i) of the ADEA, added last year to required continued benefit accruals for employers who work beyond normal retirement age, may cover the issue of early retirement incentives. We think that the assumption about §4(i)'s reach is questionable and deserves further analysis, but, of course, any proposed regulation could consider any potential impact of §4(i).

intervention will necessarily be narrowly focussed inasmuch as the Second Circuit has already ruled that the School Board's plan violates §4(a)(1), and that it is a "bona fide employee benefit plan" within the meaning of §4(f)(2). Those rulings, as the law of the case, are now binding upon the district court, and we would consequently not present any extensive arguments on those issues to the district court. 7/

BACKGROUND

Facts

Two former teachers in the North Tonawanda school system brought this ADEA action against the School Board and their union alleging that, because of their age, they were discriminatorily denied an employment-related benefit which was given to younger workers. Specifically, they challenged a provision of the 1980 collective bargaining agreement which offered a choice of two benefits to teachers age 55 to 60 who had completed 20 years of service and who agreed to retire between July 1 and February 1, in any of the three years (1980-83) covered by the agreement: (A) paid-up medical insurance premiums to age 65, plus $2000, plus $50 for each year of service beyond 20 years, or (B) a

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7/ Legal Counsel has suggested that it may be better to participate as amicus so that we are not bound by the law of the case. The point is that the court is so bound, and that it is pointless to urge reversal of the Second Circuit, whatever our posture. We would make the same arguments whether we participate as amicus or as an intervenor under §4(b)(2) as the government agency responsible for enforcing the statute and regulations at issue.

lump sum of $10,000. Plaintiffs were 61 years old on July 1, 1980, and were thus ineligible for this early retirement incentive plan by its terms. They retired the following year, on June 30, 1981, and later brought this suit to recover the $10,000 they would have received under Option B if the incentive plan had applied to them at the time of their retirement.

Although not in evidence below, we understand that the incentive was first offered to all pension-eligible teachers, regardless of age, in a previous collective bargaining agreement effective January 1979 to June 1980. However, teachers over age 60 had nine months (to September 30, 1979) within which to elect early retirement, while younger teachers had eighteen months (to June 30, 1980) to exercise the option. In any event, the plaintiffs, who were 60 years old at the time, chose not to participate in this first incentive program. We understand that the plan remains in effect.

District Court Opinion

The district court *sua sponte* entered summary judgment for defendants under §4(f)(2) after directing them to submit only a copy of the 1980 bargaining agreement together with affidavits that the copy was authentic. Plaintiffs were limited to contesting authenticity, if they could.

The court held that the requirements of §4(f)(2) were satisfied because it was undisputed that defendants were "observing the terms" of their early retirement incentive plan and because, the court concluded, the plan was "bona fide" within the meaning of §4(f)(2). It supported that conclusion with findings that the plan was voluntary and that it had not forced plaintiffs to retire. The court further found "nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act." Finally, after citing to Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), but not to any ADEA legislative history, the court stated that the plan was consistent with what Congress "meant to" do in enacting the statute, viz., to prevent forced discharge of older individuals while preserving early retirement incentives as "useful and necessary devices which employers can use to manage their work forces."

Court of Appeals Opinion

Because of the limitations which the district court had imposed on the submission of evidence, the court of appeals treated the district court's decision as a grant of a motion to dismiss for failure to state a claim upon which relief can be granted. 785 F.2d at 53. It initially ruled, in the absence of any dispute, that the incentive plan violated §4(a)(1)'s prohibition against age-based discrimination in "compensation, terms, conditions or privileges of employment." 785 F.2d at 53-4. It then considered whether the §4(f)(2) exception applied.

First, it concluded that the incentive plan was a "bona fide employment benefit plan" within the meaning of §4(f)(2) because it paid substantial benefits to employees covered by it and should be "read as a supplement to [the] underlying general retirement plan for the purposes of §4(f)(2)." 785 F.2d at 54. The court reasoned that, because the special incentive simply increased retirement compensation and, "like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan." 785 F.2d at 56. The court pointed to Patterson v. Independent School District #709, 742 F.2d 465, as support for its holding, noting that Patterson had upheld an early retirement incentive under §4(f)(2) on the ground that it merely encouraged employees to activate the general pension plan, which was admittedly lawful, at an earlier age. 785 F.2d at 55.

The court rejected plaintiffs' argument that §4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1), to include within §4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan -- e.g., whether it offered a lump sum benefit before age 60 or one that tapered off by 60 -- goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

The court then turned to the question of whether the plan was a subterfuge to evade the purposes of the Act. Noting that defendants bear the burden of proof on this issue, it held that these defendants had not sufficiently discharged that burden to justify dismissal without trial. However, the court professed uncertainty as to the nature of the proof §4(f)(2) requires in this context.

It pointed out that the "subterfuge" proviso historically has been litigated only in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option." 785 F.2d at 58. Nonetheless, it recognized that Congress in its 1978 ADEA amendments banning mandatory retirement left the "subterfuge" language in the statute, thereby requiring employers to show something more than that challenged benefit plans are bona fide. For this reason, and in light of Labor's §4(f)(2) interpretation (29 C.F.R. §860.120(a)(1)) requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations, the court held at minimum that the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 53. The court opined, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59. It remanded the case to allow the district court, with EEOC's assistance, to consider in the first instance the nature of proof which will discharge defendants' burden of proving the absence of subterfuge in cases such as this.

DISCUSSION

I. Preliminary Observations

While Congress has made quite clear that mandatory early retirement is unlawful (see §4(f)(2), 29 U.S.C. 623(f)(2)), it is equally clear that Congress has not prohibited employees from voluntarily choosing early retirement. Instead, a primary goal of the ADEA is "to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." 118 Cong. Rec. 7745 (1972), reprinted in ADEA Leg. Hist. at 205 (Remarks of Sen. Bentsen in introducing an amendment to extend the protection of the ADEA to government employees, quoting Report of the White House Council on Aging). Truly voluntary early retirement incentives facilitate that choice by allowing some employees to retire comfortably and to pursue neglected professional or personal interests. In addition, they enable an employer to reduce or modify its work force, when necessary, in a way that seems more humane than to impose widespread layoffs.

There may, however, be drawbacks to early retirement incentives. Such plans tend to exacerbate the expectation of earlier and earlier retirement. In 1948, 89.5% of men over 65 were in the civilian labor force, compared with 17.4% in 1983. "Mixed Bag, As Early Retirement Grows in Popularity, Some Have Misgivings," Wall St. J., April 24, 1984. With an increasingly aging population, many people will have to work until age 65 or 70 in order to maintain supplies of skilled workers and to keep the Social Security system solvent. Ibid. Moreover, incentive plans often are more costly to the employers than anticipated. Ibid. Employees, too, may suffer in that increasing life expectancy and inflation may erode the early retirement income which seems adequate initially.

Finally, whether such a retirement is actually voluntary, in any meaningful sense, is an ever present issue in many incentive cases. "Incentive" plans are generally offered in a climate of economic uncertainty. Employees may believe--often with some reason--that their choice is not between early retirement and work, but between early retirement and layoff. See Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986)(plaintiffs alleged constructive discharge on the ground that they elected early retirement because they believed their only alternative was layoff and the employer failed to disabuse them of their misimpression).

The issue here is not whether incentives per se violate the Act. They do not. Rather, in the litigation context, the sole question is whether or not the specific plan at issue is structured so that it meets the requirements set down by Congress in the ADEA by providing equal benefits regardless of age or, if not, that it falls within the 4(f)(2) exemption. It is to these issues that we now turn.

II. The Application of §4(a)(1) to Early Retirement Incentives

1. As noted above at page 8, the court of appeals ruled that the North Tonawanda incentive violated §4(a)(1)'s prohibition against discrimination on the basis of age "with respect to an individual's compensation, terms, conditions or privileges of employment." That conclusion is virtually dictated by Supreme Court precedent establishing that employers run afoul

of §4(a)(1) if they subject older workers to treatment which, "but for" the employees' age, would be different. Trans World Airlines v. Thurston and EEOC, 469 U.S. 111, 120 (1985). Accord EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984); Geller v. Markham, 635 F.2d 1027, 1035 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981). Cf. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (§703(a)(1) violated where female employee provided different periodic retirement benefits "because of sex"); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(same).

The Commission argued in Thurston that while the Act does not compel an employer to provide any particular benefits, the benefits that it chooses to provide cannot be withheld from older employees because of age. The Supreme Court agreed. Thurston, 469 U.S. at 121, citing Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)("benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free. . . .not to provide the benefit at all"). This is true whether or not participation in the plan is voluntary, because the Supreme Court has held that "the opportunity to participate in [an employee benefit] plan constitutes a 'condition[] or privilege[] of employment,' and that retirement benefits constitute a form of 'compensation.'" Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983) (emphasis added; citations and footnotes omitted). Section

4(a)(1), like §703(a)(1) of Title VII, 8/ "forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id. at 1081-82 n.10. Accordingly, an incentive plan which makes age-based distinctions in the amount of the benefit offered violates §4(a)(1) on its face. 9/ Thus, the first

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8/ Section 4(a)(1) was derived in haec verba from §703(a)(1). Lorillard v. Pons, 434 U.S. 575, 577 (1978).

9/ It is not a defense to such a discriminatory practice that the employer lacks bias or animus towards older workers. The legislative history of the ADEA indicates that Congress recognized that most age discrimination was not due to discriminatory animus but to "the ruthless play of wholly impersonal forces." The Older American Worker -- Age Discrimination in Employment, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 at 3 (1965)("§715 Report"). The Secretary concluded his report with a recommendation for "[a]ction to adjust institutional arrangements which work to the disadvantage of older workers." Id. at 20. Indeed it is settled that the only issue under 4(a)(1) is whether the benefit differential is because of age; it is irrelevant that the employer's motive may be benign. Cf. Geller v. Markham, 635 F.2d at 1034 (where cost savings are related to age, refusal to hire for those reasons violates ADEA); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983)(under ADEA, economic savings not a legitimate justification for selecting older employees for discharge); Franci v. Avco Corp., 538 F.Supp. 250 (D. Conn. 1982) (layoff of highly paid older workers to save money violates ADEA). See also, City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 716-17 (Title VII does not permit a "cost justification" defense).

Is is not enough to allege that the employer is motivated by a desire to save money. An employer could save money by paying older workers a lower annual wage than younger workers were it not for the ADEA. See 29 C.F.R. §1625.9 and cases cited supra. As Representative Hawkins explained in discussing pregnancy discrimination:

(footnote continued)

question in incentive cases is whether the challenged plan offers unequal benefits to employees on account of their ages.

2. a. The North Tonawanda defendants conceded that their plan violates §4(a)(1). They had little choice. The plan provides for a substantial financial benefit ($10,000, or cash plus health insurance premiums) to be paid to employees age 55 to 60 who are otherwise eligible for early retirement and who volunteer to leave the work force. After employees reach the age of 61 they are deprived of that benefit. Thus, employees age 61 and over are treated differently from similarly-situated younger employees because of their age and the plan on its face violates §4(a)(1) because, "but for" their age, retirement eligible employees over age 60 would be entitled to the incentive when they retired. 10/

9/ (Footnote continued)

> eradicating invidious discrimination costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or Title VII. . . .

Introductory remarks of Mr. Hawkins on H.R. 6075, 123 Cong. Rec. 10583 (1977) reprinted in, Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, 26 (Comm. Print 1980).

10/ There can be no argument here that the plan does provide equal benefits and that the incentive merely compensates younger workers for the benefit reductions that usually accompany early retirement (see discussion infra at 19-23). In New York normal retirement age is 60; the 60 year old, therefore, gets full benefits plus $10,000 while the 61 year old gets only the retirement benefits.

b. Defendants have asserted, however, that it somehow makes a difference that all employees, including plaintiffs, had a right to take the incentive if they retired by June 30, 1980. (See supra at 7). Although the terms of this "window" provision were not in the record before the Second Circuit, the court held that any such "window" was immaterial to defendants' §4(a)(1) liability because "[plaintiffs] claim [was] not that they were denied the opportunity ever to participate in the incentive plan, but that they were denied the opportunity on the date they ultimately chose to retire." 785 F.2d at n.2. Thus, it is the law of the case, binding on the district court, that the fact that employees once had the option of taking the incentive is not a defense.

We think the court's analysis consistent with the terms of §4(a)(1). The issue under §4(a)(1) is whether at some discrete point in time the employer is treating some employees differently on the basis of their age. Here, when plaintiffs wanted to and were able to retire in June 1981, people over age 60 were denied a benefit that was available to younger people.

Moreover, defendants cannot argue that, because each employee at one time had the opportunity to participate by virtue of the window, they provided that same benefit of employment to older and younger workers. First, those over age 60 at the time the incentive was first offered had half the time offered younger people in which to elect retirement, which is a major life decision. Furthermore, when the retirement, incentive was reoffered, they were excluded. (See supra at 6-7). At any point in time (except for the initial nine months), employees aged 55 to 60 had available a benefit which those aged 61 and over did not.

To reason that an employer avoids violating §4(a)(1) by providing a short "window" of opportunity in which all employees can exercise the option is, in our view, no different than the claim that an employer could avoid liability for sex discrimination, for example, by giving women nine months after hire in which to opt into a deferred savings plan while allowing male employees to opt in at any time. That is not the law. Cf. Arizona Governing Committee v. Norris, 463 U.S. at 1081-82, n.10 (an employer cannot immunize itself from liability for providing a discriminatory benefit option simply by providing other nondiscriminatory options. 11/

11/ Two Eighth Circuit cases, IBEW, Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985) and Patterson v. Independent School District #709, 742 F.2d 465, 468 (8th Cir. 1984), might be cited for the proposition that §4(a)(1) is not violated where a window of opportunity was provided. The Second Circuit has foreclosed that result in this case. Moreover, those cases are distinguishable. In IBEW, the court, held that the employer did not violate the ADEA by offering a life insurance plan to all employees upon employment, but afterward only to those under age 40. Although the decision appears to be based partially on §4(a)(1) and the fact that all employees at one time had an option to join, the bulk of the court's decision suggests that it thought the employer could show an age-related cost justification for the plan, and, thus, qualify for §4(f)(2)'s exemption. To the extent that the court thought that §4(a)(1) was not violated if the older employees were ever given an option, we believe that it erred for the reasons discussed above.

(footnote continued)

3. Although North Tonawanda's plan violates §4(a)(1), incentive plans can be, and frequently are, structured so that they do not. The court's request for suggestions as to lawful means of structuring incentives can probably best be answered by providing a few examples of such plans already in use which actually provide equal benefits. The ensuing discussion is certainly not intended to be an exhaustive recitation of specific plans, but rather provides some broad prototypes which do not violate §4(a)(1). Thus, to recognize that some incentive plans violate the Act is by no means to call into question the legality of incentives generally, or to unreasonably restrict employer options.

First, the employer could simply offer an incentive similar to those offered here -- a lump sum or cash times years of service and/or paid up insurance premiums -- if it were offered to all retirement eligible employees regardless of

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11/ (footnote continued)

In Patterson, the court opined that an older worker who had passed beyond the age at which the retirement incentive was available had no claim because he was no different than a person who retired before the enactment of social security and was, therefore, unable to claim Social Security benefits. The court's hypothetical concerned a person who has already left the work force, however. Under the ADEA, an employer is required to provide all present employees with equal benefits (subject to the narrow §4(f)(2) exception which we discuss below). Thus, the employees over age 60 are entitled under §4(a)(1) to the same bonus for retiring which the employer chose to give to the 55 to 60 years old group.

age. For example, the International Longshoreman's Association and Port of Baltimore Management Officials have offered all longshoremen with 25 years of service a lump sum. "Dockworkers to Get Deal to Retire," Washington Post, Dec. 19, 1986.

Another typical and inoffensive retirement incentive involves lowering the age at which actuarially unreduced benefits are available in a defined benefit plan. A commonly used formula for determining benefits is [final average salary] x [a fraction of salary (usually at least 1.5%)] x [years of service] x [1 (at normal retirement age; typically 65)]. Under such plans employees can usually retire a few years before normal retirement age but the final factor of [1] will be reduced for each year short of normal retirement age, so that if one retires at age 55, the formula will be something like: [final salary] x [a percentage (1.5%)] x [years of service] x [.363]. In order to encourage early retirement, employers may offer to drop the actuarial reduction for all those otherwise eligible for early retirement. In this way, the employer is not providing unequal benefits on the basis of age. Rather, each retirement eligible employee's pension will be calculated on the basis of salary and years of service. Thus a 65 year old employee with a $40,000 final annual salary and 20 years of service will receive the same periodic pension benefit as a 55 year old with the same pay and years of service.

It may be argued that removing the actuarial reduction for the younger worker leads to unequal benefits because the actuarial value of the benefit will be greater for younger employees as a group than for the older employees as a group. The focus of §4(a)(1), however, like its Title VII counterpart (§703(a)(1), 42 U.S.C. 2000e-2(a)(1)), is on the individual, not on the group. Arizona Governing Committee v. Norris, 463 U.S. at 1073 (1983); Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708 (1979). Hence, actuarial predictions of value -- even though they may be accurate for the group -- are not pertinent to whether §4(a)(1) is violated. Manhart, 432 U.S. at 710 n.20 (impact on group irrelevant, retiree's total pension benefit depends on his or her actual life span) (emphasis in original). Rather, the question is whether each employee receives equal ascertainable benefits irrespective of age. 12/ Thus, if all eligible employees receive equal

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12/ For this reason, it would be incorrect to argue that §4(a)(1) is not violated because the incentive is a salary replacement (see Britt v. E. I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985), which should be greater for younger workers who are potentially foregoing greater future earnings. The future work pattern of any individual is entirely speculative. Manhart and Norris make clear that projections about the probable life or working life of the group cannot justify unequal benefits under §4(a)(1). We note, too, that Britt itself does not purport to support any such argument. It held only that the employer did not violate §4(a)(1) when it declined to allow employees to draw the incentive and retirement benefits simultaneously. See further discussion infra at 38-9.

monthly benefits for life, 13/ they are not being treated differently because of age. See id. at 711-12. Cf. Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986) (employer did not violate §4(a)(1) where its early retirement plan gave equal monthly benefits to every employee whose age and years of service totalled 75, even though the total benefit was larger for younger than older employees because younger employees drew the benefit for a longer period of time). 14/ In short, where the incentive merely amends the underlying benefit plan so

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13/ By "equal benefits" we are referring to an equal fraction of salary times years of service. The same analysis would apply to incentive plans for which the underlying retirement plan prescribes a fixed monthly amount for all employees of a given age and length of service. If the employer simply lowers the age at which the benefit is available, §4(a)(1) is not violated.

14/ We do not think that the court in Dorsch correctly analyzed the facts of that case. There the employer offered $600 per month to eligible employees until they reached age 62. Plaintiffs argued that younger employees were getting a greater total benefit because they received the supplement for a longer period of time. Because there was a cut-off at age 62, and the total benefit was therefore ascertainable, the court may have erred in its conclusion that the plan did not violate §4(a)(1). See Potenze v. New York Shipping Ass., 804 F.2d 235 (2nd Cir. 1986)(a plan which make distinctions among recipients on the basis of age violates section 4(a)(1)).

Nevertheless, in stressing the importance of periodic rather than total value, we think the court may have implicitly recognized that the periodic benefit is the appropriate comparison when the total value to the individual is ascertainable only by reference to actuarial assumptions.

that all retirees receive an equal periodic benefit for life, it does not violate §4(a)(1). 15/

A third incentive used by several employers is to give extra age and service credits -- frequently five years -- to each employee. Because virtually all plans have a minimum age and service requirement for pension eligibility, this will increase the number of employees eligible for retirement. It will also make some employees eligible for actuarially unreduced benefits; for example, if normal retirement age is 65, a 60 year old will be able to get actuarially unreduced benefits. Finally, in the typical defined benefit plan, described above, in which years of service are part of the

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15/ It might be argued that incentives by definition give something extra to younger workers that the older employees have already earned -- here, for example, a vested interest in a pension benefit of a certain amount. We disagree. Employers can always extend a benefit to larger groups of employees without having discriminated against those who already have the benefit. For example, if an employer offered college tuition to all management trainees with eight years of service and later extended the benefit to all management trainees, we do not think there is a serious argument that the value of the benefit to the trainees who already have eight years service has been diminished.

Furthermore, such an argument seems to assume that pension benefits are purely a reward for service. They are not. They are also viewed as a deferred wage or an income stream to provide for loss of income upon retirement. E. Allen, Jr., J. Melone, and J. Rosenbloom, "Pension Planning" 2-7, 33 (5th ed. 1984). That pensions are not solely a reward for service is evidenced by the facts that one cannot draw on them at all until a certain age; some minimum amount can be drawn after a miniscule service period; there is a significant actuarial reduction for those who retire before

(footnote continued)

calculation of benefit amount, this incentive will increase the periodic benefit of every employee. Both IBM and Xerox have recently offered five year age and service add-ons. Daily Labor Report (BNA), Dec. 19, 1986, A-9. If every employee is given the add-on, there is no disparate treatment on the basis of age. Some employees will become eligible for early or full benefits who were not previously eligible. As discussed above with regard to providing actuarially unreduced benefits to younger employees, this simple expansion of the group eligible for retirement does not deprive the older worker of a benefit, and such a plan would be lawful under §4(a)(1). 16/

In sum, these examples make clear that there are several early retirement incentives already in use by major companies which do not violate §4(a)(1).

15/ (Footnote continued)

the "normal retirement age" (usually 65); and they are often payable at least until death whether one lives 10 or 40 years after retirement.

In short, pension benefits, in their role as income replacement, make it possible for eligible employees to choose retirement. We do not think that an older employee is deprived of a benefit when the employer simply makes it possible for more employees to choose retirement.

16/ Some employers limit add-ons by capping them at a given age or by limiting total service credits. This memorandum cannot analyze the many variations which exist.

III. Application Of The §4(f)(2) Exemption To Retirement Incentives

It is settled that exceptions to §4(a)(1)'s prohibition against discrimination are to be narrowly construed 17/ and that to establish the §4(f)(2) defense the employer must show: 1) there is a bona fide employee benefit plan; 2) the action was taken in observance of its terms; and 3) the plan is not a subterfuge to evade the purposes of the Act. United Airlines v. McMann, 434 U.S. 192, 198 (1977).

The court of appeals in this case ruled that the School Board and union were "observing the terms" of their incentive plan. We agree, and believe that this will seldom be a disputed issue in litigation attacking early retirement incentives.

The court of appeals also ruled that the incentive plan was a "bona fide employee benefit plan" within the meaning of §4(f)(2) because it paid substantial benefits, was "functionally related" to the underlying retirement plan, and involved siginificant cost considerations (see supra at 8-9) 18/, but that the School Board and union must prove that their actions

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17/ Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 469 U.S. 832 (1982); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 766 (1977).

18/ Although the question whether the North Tonawanda incentive is a "bona fide benefit plan" need not be extensively addressed because the district court cannot reverse the Second Circuit's ruling, we question that aspect of the court of appeals' construction of §4(f)(2). An incentive plan could fall within

(footnote continued)

were not a "subterfuge" by showing "a legitimate business reason for structuring the plan as [they] did." (supra at 10-11). It added that the district court should seek the Commission's guidance concerning the meaning of subterfuge as applied to the ADEA as amended in 1978.

A. The Meaning of "Subterfuge" In The Context of Early Retirement Incentives

1. "Subterfuge" in General

Even if an early retirement plan qualifies generically for the shelter of §4(f)(2), the employer must prove that the plan is not a "subterfuge to evade the purposes of the Act."

18/ (footnote continued)

§4(f)(2) if it were a plan in which age is an actuarially significant factor in plan design (44 Fed. Reg. 30649-50; 29 C.F.R. §860.120(a)(1) and §860.120(b)) or where the plan is so enmeshed with the underlying pension plan that it becomes a coordinated benefit plan. Clearly, there are no actuarial considerations in a plan which offers $10,000 to all workers age 55-60 and nothing to those over age 60. The court rejected the argument that §4(f)(2) covered only those "plans" in which benefit reductions are justified by "actuarially significant cost reductions" on the ground that the regulations at 29 C.F.R. 860.120(a)(1) do not specify that "'cost considerations' must be actuarially based," and that there are cost considerations in that the employer saves more years of continued full salary by inducing younger workers to leave. This interpretation runs afoul of §4(f)(2). For the reasons discussed infra at 28-32, that section insulates unequal benefits only where the age of the employee actually increases the cost, vis-a-vis the younger worker, of providing the benefits. A $10,000 incentive for early retirement costs the same regardless of whether it is offered to a 59 or 61 year old. Section §4(f)(2) does not permit the employer to withhold it from the older worker on the ground that the latter may have received salary for working two years longer than the younger employee. It is a newly created benefit which is wholly independent of salary. As was true in Borden's

(footnote continued)

"Subterfuge" is a "scheme, plan, stratagem or artifice of evasion." Potenze v. New York Shipping Assn., 864 F.2d 235, 238 (2d Cir. 1986), citing United Airlines v. McMann, 434 U.S. 192, 203 (1977). Thus the employer must prove lack of intent to evade the purposes of the Act. EEOC v. Eastern Airlines, ___ F.2d ___, 27 FEP Cases 1686, 1689 (5th Cir. 1980).

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers. Section 2(b), 29 U.S.C. 621(b). Where the employer has established or amended a benefit plan after passage of the ADEA to the disadvantage of older employees, it must prove that its action was prompted by legitimate, nondiscriminatory business reasons. EEOC v. Home Insurance Co. 672 F.2d 252, 260 n.11

18/ (Footnote continued)

and in Alford v. City of Lubbock, 664 F.2d 1272 (5th Cir.), cert. denied, 456 U.S. 975 (1982), this was "a simple fringe benefit administered in a single easily calculated payment" not intended by Congress to be encompassed by §4(f)(2). Employers should not be able to avoid the clear import of Bordens, Alford and EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 105 S.Ct. 92 (1984), by the simple expedient of labeling a plan a "retirement incentive" rather than "severance pay."

Indeed, North Tonawanda has not argued that this incentive was designed to coordinate with the existing pension plan so as to compensate employees under age 61 for receiving reduced pension benefits due to early retirement. It almost certainly could not do so because a lump sum is offered to those of varying ages, and because 60 is the normal retirement age under the North Tonawanda plan and the benefits of 60 year olds therefore are not actuarially reduced. For these reasons, the incentive was not so closely related to the retirement plan so as to be swept into §4(f)(2)'s coverage.

(2d Cir. 1982); EEOC v. Baltimore & Ohio Railway Co., 632 F.2d 1113 (4th Cir. 1981); EEOC v. Eastern Airlines, 27 FEP Cases at 1689; Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980). However, we have concluded that congressional activity in the face of the Department of Labor's regulations makes clear that, through §4~~(f)~~(2), Congress intended to recognize only one legitimate reason for providing smaller benefits to older workers, viz., that the cost of the benefit increases because of age. See EEOC v. Borden's, Inc., 724 F.2d at 1396; EEOC v. Westinghouse Electric Corp., 725 F.2d at 224-25.

a. The 1967 Congress recognized that the cost of certain employment benefits increases with age. Senator Javits proposed the amendment which became §4(f)(2) in order to provide employers with the "flexibility" to make necessary distinctions based on age so as to ensure that employers would not be discouraged from hiring older workers because of the increased costs associated with providing benefits to them. Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967); See also EEOC v. Borden's Inc., 724 F.2d at 1396. Senator Javits explained:

> The amendment relating to . . . employee benefit plans is particularly significant. Because of it an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance

> *benefits* as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers*, actually be discouraged from hiring older workers. At the same time it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

113 Cong. Rec. 31254-55 (1967)(emphasis added). The floor manager of the bill, Senator Yarborough, elaborated on the §4(f)(2) exemption, saying that older workers would not be denied employment but their rights to "full consideration" in pension plans would be limited. 113 Cong. Rec. 31255 (1979). 19/

Since 1967, Congress has acted to make clear that the exception is to be so limited. In 1969 the Department of Labor, which was then charged with administering the Act, published an interpretation specifically stating that §4(f)(2) only applied to employee benefit plans which involved age-related cost considerations. 29 C.F.R. 860.120, 34 Fed. Reg. 9709 (June 21, 1969):

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older

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19/ The views of Senators Javits and Yarborough, as sponsors of the ADEA, are entitled to substantial weight in interpreting the statute. *FEA* v. *Alonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

In the course of considering the 1978 ADEA amendments, Senator Javits explicitly approved the government's interpretation, saying:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. *Thus a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage*.

124 Cong. Rec. 8212 (emphasis added); *see also* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978)("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age based variations in benefits where the cost of providing benefits to older workers is substantially higher"); remarks of Rep. Waxman, 124 Cong. Rec. 7888 (1978) ("In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act."). The 1978 history is especially significant in construing the section because raising the minimum mandatory retirement age to 70 obviously affected the

operation of §4(f)(2) plans and the section's purpose was thus a critical element of the 1978 amendments.

After recognizing and indicating agreement with the DOL interpretation of §4(f)(2), Congress reenacted the section unchanged except to specify that the exemption did not permit involuntary retirement. It also asked the Secretary of Labor to issue more comprehensive guidelines. 20/ Accordingly, in 1979, the Labor Department issued an amendment to its Interpretative Bulletin on Employee Benefit Plans (IB), 29 C.F.R. 860.120, 44 Fed. Reg. 30648 (May 25, 1979), which continued in effect the cost principle previously enunicated by the Department and endorsed by Congress. 29 C.F.R. §860.120(a)(1). More specifically, the regulations specify that a plan which prescribes lower benefits for older employees is "not a subterfuge within the meaning of §4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. §860.120(d).

b. Congress has twice amended the ADEA since Labor's 1979 Interpretative Bulletin. The Bulletin permitted a few exceptions to the "equal cost" principle which, inter alia,

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20/ See remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978); remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (1978) ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefits plans, and the Secretary is urged to act as soon as possible.").

allowed employers to include medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. §860.120(f)(ii)(A) and (f)(iv)(A). In 1982, Congress amended the ADEA to disallow the medicare exception. Section 4(g) of the ADEA, Pub. L. 97-248 §116. See also S. Rep. 97-494, 97th Cong., 2d. Sess, reprinted in 1982 U.S. Code Cong. & Admin. News 792. Last year Congress amended the statute to require pension benefit accruals beyond normal retirement age. Section 4(i) of the ADEA, Pub. L. 99-509 §9201.

The significance of these Congressional actions is that §4(f)(2) was left intact, along with Labor's "equal cost" interpretation after Congress indicated that it was familiar with the IB. Indeed, Congress acted only to abolish some of Labor's exceptions to the equal cost requirement. Under established principles of statutory construction, such activity strongly supports the conclusion that Congress has reviewed and approved Labor's position that §4(f)(2) allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age. 21/

21/ Andrus v. Allard 444 U.S. 51, 57 (1979) ("particularly relevant" that Congress has twice reviewed and amended the statute without rejecting the enforcing agency's view); United States v. Rutherford, 442 U.S. 544, 553-54 and n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention . . . of Congress and [it] has not sought to alter the interpretation although it amended the

(footnote continued)

2. "Subterfuge" in this litigation

a. The court of appeals recognized that defendants offered no proof on the issue of subterfuge and, therefore, that they did not qualify for the §4(f)(2) exception under the traditional analysis of United Airlines v. McMann, 434 U.S. 192 (1977) and its own decision in EEOC v. Home Insurance Co., 672 F.2d 252 (2nd Cir. 1982). However, it expressed doubt that the same analysis should apply to a case involving incentives. First, it evidenced confusion about the role of "voluntariness." It thought that perhaps the analysis of §4(f)(2) differed when there was no allegation that the plaintiffs were forced to leave the workforce. It also suggested that in such cases the employer would have a lighter burden of proof than if retirement was allegedly coerced. On one hand, it opined that the requisite evidence of business reasons in the context of voluntary early

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21/ (Footnote continued)

statute in other respects, then presumably the legislative intent has been fully discerned"). United States v. Correll, 389 U.S. 299, 305-06 (1967)("longstanding federal regulations and interpretations applying to unamended or reenacted statutes are deemed to have received Congressional approval and have the effect of law"). U.S. v. Cerecedo Hermanos y Compania, 209 U.S. 337, 339 (1908)(where meaning of statute in doubt great weight given to construction by department charged with execution of the statute, and reenactment by Congress, without change, of a statute which has received long continued executive construction, is an adoption by Congress of such construction). See also EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (Congress' silence during the many years a Commission regulation was extant suggests its consent to the Commission's practice).

retirement incentives "would almost necessarily be less than what is required to make a showing in the case of a mandatory plan" because the older employee is not being tricked or coerced into leaving the workforce but "is being deprived only of the same opportunity to receive a bonus for early retirement as is accorded [younger] workers." 785 F.2d at 59. On the other, it recognized that such reasoning would virtually read the subterfuge language out of §4(f)(2) in regard to voluntary early retirement plans and that such result is inconsistent with the fact that Congress in 1978 left the subterfuge language intact at the same time that it specifically barred mandatory retirement. Accordingly, the court remanded the case to the district court with instructions to seek the EEOC's assistance with respect to the meaning of subterfuge.

b. To the extent that the court thought that "voluntariness" or lack of coercion to retire altered the appropriate legal analysis, the court confused issues which sometimes coexist in retirement incentive cases and also misconceived "the purposes of the Act." The voluntariness of a plan is pertinent to any claim that employees have, in fact, illegally been coerced into retirement. Voluntariness may also be a defense if the issue is whether the incentive is a pretext to get rid of those older workers who are eligible for it. 22/

22/ It is possible that an "incentive" plan could be structured so that, in fact, remaining employed is not a viable option for the employee. If so, the incentive would be a subterfuge. No such claim was made in this case and would have to be made by the retirees who were offered the incentive.

The issue here, however, is not whether the existence of the plan is a subterfuge or whether those 55 to 60 were coerced into retirement. Rather, the issue is whether the plan's structure -- by excluding those beyond age 60 -- is a subterfuge.

The older employees' exclusion from the benefit is not voluntary; hence, the fact that younger employees can choose whether or not to retire has no bearing on the claim here. 23/ By its statement that the incentive here does not deprive an employee of "continuation of his job" but "only of the same opportunity to receive a bonus" (785 F.2d at 59), the court appears to suggest that the purpose of the ADEA is only to bar discriminatory hiring and discharge and, therefore, a voluntary incentive plan which compels neither cannot be a "subterfuge." However, as noted above, the stated purpose of the Act is not only "to promote the employment of older persons based on their ability rather than age" but also "to prohibit arbitrary age discrimination in employment and to help employees and workers find ways of meeting problems arising from the impact of age on employment." §2(b), 29 U.S.C. 621(b)(emphasis added). Moreover, Congress declared it unlawful to discriminate not only in hiring and discharge,

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23/ For the reasons discussed *supra* at 17-18, the fact that the plaintiffs at one time had the option does not alter the fact that they do not have it now and younger employees do.

but also with respect to "compensation, terms, conditions or privileges of employment" (§4(a)(1)). Accordingly, it is evident that Congress' purpose was not only to end discriminatory hiring and termination but also to require employers to provide equal compensation and benefits. In short, the employer who compensates an older worker less than a similarly-situated younger worker pursuant to an incentive plan bears a burden of justifying its actions which is no lighter than the burden of justifying any other form of discrimination, and for the reasons we explained above at 28-32, that burden is to prove that the benefit was reduced because the cost of providing it increases as a function of age.

c. Under our analysis, the incentive offered in this case is a "subterfuge" because the denial of the benefit cannot be justified by age-related cost considerations. For this reason, it evades the ADEA's purpose of eradicating arbitrary age discrimination. For this reason alone, the §4(f)(2) defense is not available here.

Additionally, the incentive is structured so as to collide with another statutory purpose; *viz*, promoting the employment of older workers. The plan is designed so that those who work past age 60 will not qualify for an employment-related benefit which is offered to younger retirement eligible employees. Thus, the employer is providing a disincentive for employees to remain past age 60. Indeed, it is clear that the motive of the North Tonawanda defendants is to eliminate their oldest workers. 24/ Withholding an equal benefit or privilege of employment for this purpose is clearly a "subterfuge to evade the purposes of the Act." 25/

IV. Case Law On Early Retirement Incentives

The few courts of appeals which have attempted to grapple with the legality of retirement incentives under the ADEA have done so without specific congressional or administrative guidance. Not surprisingly, given the complexity of the issue, the opinions reflect a great deal of confusion.

24/ The School Board argued in the appellate court (Bd. br. at 8) that it wanted to eliminate the higher salaries of veteran teachers. This motivation clearly discriminates against the older worker and violates the Act. *See* cases cited *supra* at 15 n.9. Moreover the logical solution for this problem would be to offer the incentive to all retirement eligible employees.

The brief of the New York Assn. of School Boards argues that:

> In New York, the mandatory retirement ages for teachers. . . .were abolished in 1984. . . .[and] [i]f the plaintiffs succeed in this case, the result will be either that elderly public employees may be separated for cause under decidedly unpleasant circumstances or they may retire earlier without any bonus.

25/ To the extent that employers *extend* a benefit to induce voluntary retirement -- and assuming no element of coercion -- their motivation is not particularly relevant and beneficiaries of the offer could not claim a violation of the Act. Here, however, the act complained of was not the extension, but the *withholding*, of a benefit for the purpose of discouraging the employment of all those over age 60.

Two cases were decided under §4(a)(1) and did not address the applicability of §4(f)(2). Dorsch, discussed supra at 22 n.14, did not involve an incentive, but an early retirement benefit which was available to the plaintiff who had been involuntarily retired. 26/ Under the plan, any employee whose age and service added up to "75" could receive $600 per month until age 62. The challenge was based on the notion that the total value of the benefit was greater for younger workers but, as noted above at 21, n.9, the court concluded that, because the monthly benefit was equal, §4(a)(1) was not violated. The fact that the benefit ceased at age 62 was neither challenged nor explained.

The issue in Britt v. E.I. DuPont de Nemours & Co., Inc., 768 F.2d 593 (4th Cir. 1985), was whether DuPont violated §4(a)(1) by requiring retirement eligible employees who elected seniority-based severance pay under a voluntary reduction in force program to defer receipt of their pension benefits. The court held that it did not, reasoning that severance pay was a wage substitute and that, as such, accepting it was the same as continuing to work for purposes of determining the accrual date of retirement benefits. The decision does

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26/ Plaintiff's original complaint attacked only his termination. He subsequently amended it to challenge the early retirement plan.

not reveal whether younger employees who received severance pay were also required to defer receipt of pension benefits.

We believe that the *Britt* court erred in trying to distinguish *Bordens* and *Westinghouse* on the ground that in those cases the severance pay was "an arbitrarily determined. . . fringe benefit," while DuPont's severance pay was a "wage substitute". First, the severance pay in *Westinghouse* and *Bordens* was not arbitrarily determined but, like DuPont's, was based on years of service. Such bonuses, whether given as an incentive or upon involuntary termination, are clearly a reward for service but also do constitute a source of income to compensate for not working. Thus, the distinction between wage substitute and fringe benefit is artificial. More importantly it is irrelevant. We are not prepared to say that the *Britt* court reached the wrong result, but its reasoning is flawed because it did not really grapple with the critical issue; *viz.*, whether older employees who took the incentive received a lesser benefit than younger employees who took the incentive. In any event, since they do not involve §4(f)(2), neither *Britt* nor *Dorsch* assist in answering the issue in *Cipriano*.

The defendants in this case tend to rely primarily on *Mason* v. *Lister*, 562 F.2d 343 (5th Cir. 1977), and *Patterson* v. *Independent School District #709*, 742 F.2d 465 (8th Cir. 1984). *Mason* has no bearing on the issues presented here.

It involved a challenge to the federal employee program for early retirement at times of reductions in force. The challenge was lodged by an employee who was under the floor for eligibility and who argued that the applicable retirement provisions were repealed by the ADEA. 27/ The court simply held that the mere existence of a voluntary incentive plan which did not force retirement was not a subterfuge, a proposition with which we agree. As noted above, the issue here is that the employer is offering an unequal incentive, an issue not addressed in Mason.

Patterson, on the other hand, is relevant because the court upheld a "sliding scale" incentive. The court's analysis, however, is difficult to follow. On the one hand, the court recognized that to fit within §4(f)(2) a plan must be "a systematic interrelated structure where consideration of age is an actuarial necessity." On the other, it proceeded to hold, essentially, that a voluntary plan is immune from scrutiny. It did not analyze the meaning of "subterfuge" but, instead, reasoned that since the Supreme Court in United Airlines v. McMann, 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, "a voluntary plan is a fortiori permissible".

Patterson failed to recognize, first, that the McMann

27/ In a RIF, the federal law simply lowers the number of years of service and age at which one becomes retirement eligible. 5 U.S.C. 8336(d).

plan was upheld on the ground that it was established before the ADEA was enacted and, therefore, could not have been a "subterfuge to evade the purposes of the Act." The Patterson plan was instituted after the passage of the ADEA. Second, McMann was overruled by the 1978 amendments in which Congress made clear that involuntary retirements were unlawful. The Patterson court was apparently oblivious to the amendments.

Another case sometimes cited in early retirement litigation is Parker v. Federal National Mortgage Assn., 741 F.2d 975 (7th Cir. 1984), in which the court perfunctorily rejected plaintiff's claim that he was discriminatorily denied severance pay. The case primarily concerned plaintiff's allegation that he was forced into early retirement and the court rejected that claim on the facts. In response to his allegation that he was denied severance pay because of his status as a retiree, the court merely stated that the decision to be laid off or retired was his choice. In fact, the decision indicates that plaintiff's choice was between retiring or being transferred to another office. The court made no effort to compare the treatment of plaintiff vis-a-vis younger employees or to analyze the requirements of the 4(f)(2) exception. Thus, it too fails to provide an analysis of the issue at hand.

The Second Circuit, in a case decided after Cipriano, had occasion to discuss §4(f)(2) in a different context. Potenze v. New York Shipping Assn., 804 F.2d 235 (2nd Cir. 1986), involved a guaranteed annual income (GAI) program under which longshoremen were guaranteed a certain annual salary up to age 70. Because of a change in an IRS ruling, the union decided to offset social security benefits from the GAI. The offset began at age 65 rather than at age 62 when workers could elect reduced social security. The challenge was lodged by those over age 65 who claimed that the 62-64 year old group received a windfall in that they could obtain full GAI plus early social security, whereas the 65 to 70 group received only the GAI amount.

The court concluded that the GAI plan was a §4(f)(2) covered "benefit plan" because, if age related cost considerations must be proven, the union showed that the offset results in savings to the fund. The court failed to recognize, as discussed supra at 28-32, that the only permissible cost savings are those which increase as a function of age. See also, supra at 15 n.9. The court further found that the plan was not a subterfuge on the ground that the Labor Department's Interpretative Bulletin allows employers to consider the value of government-conferred benefits in designing retirement insurance plans. The court also observed that, were the offset to begin at age 62, employees would be forced to take reduced social security at that age which would continue to be reduced beyond age 70, when GAI was no longer available, and that such result would frustrate the purposes of the Act. 28/ This aspect of the opinion obviously has no

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28/ Curiously, since plaintiffs apparently were not aruging that no offset should occur, but only that it should begin at 62 rather than 65, they would not have received any greater benefit even if they had prevailed. This anomoly may have influenced the result.

CERTIFICATE OF SERVICE

Copies of the foregoing reply brief were served by being placed this day in first class mail, postage prepaid, to the following counsel:

Carol F. Fowler
SHOOK, HARDY & BACON
1101 Walnut, 20th Floor
Kansas City, MO 64106

David J. Waxse
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Mark S. Flynn
MARK S. FLYNN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W., Rm. 224
Washington, D.C. 20507
(202/FTS) 634-6150

August 23, 1985

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

Quarterly Report Under Section 13 or 15(d)
of the Securities Exchange Act of 1934

For Quarter Ended September 30, 1985

Commission File Number 1-4471

XEROX CORPORATION
(Exact name of registrant as
specified in its charter)

New York
(State or other jurisdiction of
incorporation or organization)

16-0468020
(IRS Employer Identification No.)

P.O. Box 1600
Stamford, Connecticut
(Address of principal executive offices)

0690-
(Zip Code)

(203) 329-8700
(Registrant's telephone
number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15 (d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No

APPLICABLE ONLY TO CORPORATE ISSUERS:

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Class	Outstanding as of October 31, 1985
Common Stock	96,173,103
Class B Stock	133,066

This document is comprised of 45 pages.

*** All ***

PAGE 10

XEROX CORPORATION

Notes to Consolidated Financial Statements

Income from continuing operations for the quarter ended September 30, 1985 included a special charge, after income tax benefits, of $67.5 million in connection with reserve strengthening at the L.W. Biegler unit of C&F. This charge reduced third quarter income from continuing operations by $.70 per share.

As a result of the aforementioned charges for discontinued operations and reserve strengthening, in October 1985 ~~the Company replenished the capital of C&F by $200 million.~~

9. In 1983 an action was brought against the Company in the United States District Court for the District of New Jersey which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act (Act) on behalf of named plaintiffs and a purported class of all persons between the ages of forty and seventy who, since May 1, 1980, had unsuccessfully applied for employment in a salaried position with the Company, or who were employees of the Company in such a position and were denied promotion or were terminated.

At the court's direction, notice of the action and an opportunity to join in the suit were given to all salaried employees within the forty to seventy age group who left the employ of the Company during the period from May 1, 1980 through March 31, 1983, or who were employed by the Company on March 31, 1983. The notice provided that such persons were entitled to join in the suit only if they claim that during the relevant period they were terminated, required to retire or denied equal opportunities for promotion as a result of age discrimination. Approximately 1,300 individuals have indicated they wish to join in the suit. The judge has reserved decision with respect to whether job applicants should be permitted to join in the suit.

The named plaintiffs seek reinstatement for themselves, and they seek for themselves and for members of the class compensatory damages consisting of back pay including fringe benefits, and liquidated damages doubling the amount of compensatory damages if the conduct was wilful. The named plaintiffs also seek compensatory, punitive, exemplary and special damages under state law claims. Plaintiffs also seek injunctive relief.

In 1984, the Company received a letter from the Equal Employment Opportunity Commission (EEOC) alleging that the Commission determined that the Company had violated the Act by following policies and practices which discriminated against salaried employees and former employees in the forty to seventy age group. The EEOC letter, which was in standard form prescribed by EEOC operating procedures, was issued under a general delegation of authority to the EEOC staff without any hearings or formal determinations by the Commission itself. The purpose of the letter was to stop the statute of limitations from running and to commence a conciliation procedure with respect to terminated employees. In 1984, the Company engaged in such conciliation and discussions about the merits of the Company's position with the EEOC. To date there have been no further developments.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 13, 1985

TO : James N. Finney,
Associate General Counsel

THRU : Leroy T. Jenkins, Jr.,
Assistant General Counsel

THRU : Estelle D. Franklin,
Supervisory Trial Attorney

FROM : Carlton L. Preston,
Senior Trial Attorney

Judith L. Mathis,
EOS

SUBJECT : Conciliation Recommendation, EEOC v. Xerox

Attached is the conciliation recommendation package. It consists of of the following documents:

1. Memorandum describing the rationale for the conciliation offer;
2. Draft of the proposed conciliation agreement;
3. Draft cover letter to Phil Smith; and
4. Draft letter to the Lusardi attorneys explaining our intention to include in our conciliation at least seventy of their clients whose causes of action are outside the scope of their lawsuit.

We are available to provide additional information and/or clarification if necessary.

DRAFT

September , 1985

TO : James N. Finney,
Associate General Counsel

THRU : Leroy T. Jenkins
Assistant General Counsel

THRU : Estelle D. Franklin
Supervisory Trial Attorney

FROM : Carlton L. Preston
Senior Trial Attorney

Judith L. Mathis
EOS

SUBJECT : Conciliation Offer to Xerox

After months of investigation, analysis of documentary evidence, and extensive interviewing of former Xerox employees who allege they were discriminated against on the basis of their age, we have formulated what we believe is an appropriate settlement offer to be presented to the Xerox Corporation. The terms of settlement offered by the Commission are necessarily dependent initially on an agreement in principle with the specific dollar amount of liability to be computed jointly according to the principles agreed upon.

BACKGROUND

A private lawsuit alleging age discrimination, Lusardi v. Xerox, was filed in New Jersey in March, 1983. After extensive procedural litigation, which included five unsuccessful appeals by Xerox to the Third Circuit, notice to a potential class of 45,000 present and former Xerox employees was sent in March, 1984. As noted by the forms sent to all potential plaintiffs, the cut-off date for possible discrimination covered by that suit is March 31, 1983. About 1350 present and former employees returned notices which expressed the intention to become plaintiffs in the suit and to be represented by the two New Jersey law firms who sent the notices.

Included among that number were about 70 persons who, in spite of the cut-off date cited in their notice, attempted to join the lawsuit even though their cause of action arose after March 31, 1983. The names and addresses of these persons were given to us by Mr. Adler. There may be more of these people in the Lusardi group who are as yet undiscovered. In addition to these people, there are undoubtedly many potential claimants who were discharged after March 31, 1983 who are so far unknown because they did not return the notice when they saw the private lawsuit clearly did not cover them.

Because litigation under the ADEA is governed by the provisions of the FLSA, the class of plaintiffs must, in theory, each prove a prima facie case. The Lusardi plaintiffs are currently conducting discovery as to the sample of 50 plaintiffs chosen as representative of the whole group. If the plaintiffs are successful in making out a prima facie case for this sample group, the Court has ruled that they then may proceed on behalf of the whole group.

Most of the plaintiffs were salaried employees who claim that they were terminated or forced to retire because of their age. They also allege that forced early retirement resulted in a 1/3 to 2/3 reduction in retirement benefits and that they lost substantial money because their profit sharing funds were frozen instead of continuing to grow had they retired later. The readjustment of retirement benefits is acknowledged by both sides to be a major issue to be litigated. The potential liability of Xerox in this issue is enormous and would have a much longer lasting effect than just a one time pay-out of back pay. Xerox continues to vigorously defend this lawsuit.

EEOC CONCILIATION

After investigation revealed much substantial evidence supporting the allegations of widespread age discrimination by Xerox, the EEOC issued a Letter of Violation on April 19, 1984. During the conciliation period begun by the Letter, we have had three formal meetings with Xerox, as well as several informal conversations in an attempt to resolve the Commission's charge of discrimination.

The response of Xerox to our investigation and to the conciliation following issuance of the LOV seems to be a position and strategy which have been developed and followed in consideration of their defense of the Lusardi litigation. The Xerox position, from which they have not substantially deviated, is that when the Commission proves to them that individuals have suffered discrimination, they will talk about settlement for that individual. Despite documentary evidence to the contrary, Xerox continues to insist that they had no conscious policy of eliminating older, higher paid professionals.

Though Xerox has indicated willingness to conciliate the individual cases we bring to their attention, they have consistently denied us requested data which would enable us to identify and look at individuals. As noted in several previous memoranda, Xerox misrepresention of the computer data, while repeatedly assuring us that they had complied with our request, caused the Commission tremendous waste of time and money. In addition, they have refused to provide the names to match the employee data on computer tapes. After exploring other alternatives, it is clear that submission of the names by Xerox is the only practicable way we have of finding potential claimants and of computing the specific amount of potential liability Xerox faces.

PROPOSED SETTLEMENT OFFER

Issuance of the LOV initates a conciliation period during which the time period for filing charges is tolled for up to a year. Language in ADEA cases and in the compliance manual contemplates that the conciliation period will last up to one year. The year long period has ended without any substantive offer by Xerox.

There are many variables which we cannot calculate without additional facts which are only available to us through participation by Xerox. We cannot determine without a notice procedure how many potential claimants there are. The people who have come to our attention so far are only those who sent in a form in the hope they could join the private lawsuit. We cannot determine the prospective amount of retirement benefits lost and the amount and method of retirement readjustment without actuarial calculations requiring specific knowledge of the Xerox retirement system. An offer of settlement should therefore outline principles upon which we would hope we can agree and set out the methods to be used in actual calculations should agreement be reached.

Based on the facts we have uncovered so far, we can give only a rough estimate of the magnitude of backpay liability Xerox faces. We estimate that during a notice procedure about 500 claimants would come forward to allege that they had been discriminated against on the basis of their age when they were terminated by Xerox since March 31, 1983. The average amount of back pay, calculated by adding the amount of monthly salary from the date of discharge up to September 1, 1985 and subtracting any severance pay and any pay received from subsequent employment for the 70 people we have so far interviewed in depth is $28,000. Projecting that average to 500 persons results in an amount of potential backpay liability of $14,000,000. Three points are important here: (1) this number of potential claimants is an educated guess; (2) the amount of backpay liability grows as time goes on; and (3) the amount of potential liability in readjustment of retirement benefits is probably much greater than the amount of a one-time pay out of backpay.

An alternative course of action would be to proceed with the 70 persons we have so far identified as potential claimants whose cause of action arose after the cut-off date of the Lusardi lawsuit. The disadavantage of that course is that we know there are other people who would also claim the same discrimination. When asked by Xerox during negotiations or when asked by Commissioners if these 70 people are all inclusive, we would have to answer no. That answer would inevitably lead to more questions about how many potential claimants we estimate there to be and about how we anticipate reaching them.

PROPOSED TERMS TO OFFER XEROX

1. The Commission would represent all former salaried Xerox employees who were 40 or over at the time of their termination, who were terminated after May 1, 1980, and who allege they were involuntarily terminated on the basis of their age. (This date would include all those who are already plaintiffs in the Lusardi suit; a fall back position would be to represent all claimants who were terminated after March 31, 1983, the cut-off date for Lusardi)

2. The EEOC and Xerox would together establish a claims procedure through which bona fide claimants could be identified. The suggested procedure would include a questionnaire for claimants to complete and review of the questionnaires by attorneys for both sides. EEOC would have the right to information upon which to evaluate the claim and would make the decision as to which claimants are bona fide. Conflict resolution would be provided by a binding arbitration clause. Xerox would pay for the arbitrator.

3. The Xerox Corporation would furnish the names and addresses of all salaried employees who were terminated since March 31, 1983 and who were 40 or over at the date of their termination. Xerox would send to all these people a notice, to be composed by the EEOC and Xerox together, advising them of the settlement and of their right to file a claim. Attached to the notice would be the questionnaire to be returned within an established time limit in order to be considered as a claimant under this settlement agreement.

4. The Xerox Corporation would give full relief to those persons identified as discriminated against on the basis of their age. Full relief shall include:

   a. BACK PAY--the amount of monthly salary lost from the date of termination to the date of settlement minus any severance pay and minus any pay from subsequent employment.

   b. RIGHT of REINSTATEMENT--to a job substantially like the one from which the former employee was terminated and to a grade and rate of pay identical to that he had when terminated by Xerox. It will be understood that a former employee who declines reinstatement because he has since reached the age at which he had planned to retire does not waive his right to back pay or to adjustment of retirement benefits. This provision will contain a no retaliation clause.

   c. ADJUSTMENT of RETIREMENT BENEFITS--the amount and method of determining and paying out the appropriate adjustment shall be decided by a committee composed of EEOC personnel, Xerox employees involved in pension administration, and an outside expert in pension benefits and administration. The Xerox Corporation will bear the cost of employing an outside expert.

   d. REIMBURSEMENT FOR MEDICAL EXPENSES--medical expenses which were incurred by the former employee or his family after coverage by the Xerox group employee health insurance expired shall be reimbursed by Xerox. Medical expenses shall be defined to include the cost of health insurance which was incurred by former employees after expiration of coverage by Xerox employees' group health insurance.

   e. REIMBURSEMENT FOR LIFE INSURANCE--the cost of life insurance paid by the employee after termination above the cost to him while he was a Xerox employee. The amount of life insurance coverage reimbursible may not exceed the employee's coverage when he was employed by Xerox.

CONCILIATION AGREEMENT

In the matter of:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

Xerox Corporation

An investigation having been made under the Age Discrimination in Employment Act (ADEA) by the U.S. Equal Employment Opportunity Commission (EEOC) and a Letter of Violation having been issued, the parties resolve and conciliate this matter as follows:

I. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by Xerox of any violation of the ADEA.
2. The EEOC deems this Agreement to resolve all issues raised in the Letter of Violation and the investigation and agrees not to sue Xerox with respect to any matter of specific relief conciliated in this agreement; provided, however, that the EEOC reserves all rights to proceed with respect to matters like and related to these matters but not covered in this Agreement and to secure relief on behalf of aggrieved persons not covered by the terms of this Agreement.
3. Nothing in this Agreement shall be construed to preclude the Commission and/or any aggrieved individuals from bringing suit to enforce this Agreement in the event that Xerox fails to perform the promises contained herein.
4. Xerox agrees that it shall comply with all requirements of the ADEA.
5. The parties agree that there shall be no discrimination or retaliation of any kind against any person because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding, or hearing under the ADEA.
6. Xerox agrees that the Commission may review compliance with this Agreement. As part of such review the EEOC may interview employees, examine and copy relevant documents.

II. DEFINITIONS

1. Affected Class:

This agreement is entered into by the EEOC on behalf of all former exempt employees of Xerox and its subsidiaries who have been terminated since May 1, 1980, who were aged 40 or over at the time of their termination, and who allege that they were terminated on the basis of their age.

2. Relevant Time Period:

Included in this agreement will be terminations which were effective between May 1, 1980 and the date of this agreement.

3. Terminations:

For the purpose of this agreement termination shall include resignations, retirement, and those who left because of voluntary and involuntary reductions in force.

4. Xerox:

When cited in this agreement, Xerox shall include the Xerox Corporation and its domestic subsidiaries.

II. TERMS OF AGREEMENT

A. IDENTIFICATION OF CLASS MEMBERS

The EEOC shall furnish to Xerox the names and pertinent information concerning approximately 70 claimants who allege that they were terminated by Xerox on the basis of their age since March 31, 1983. In addition to those persons, Xerox shall furnish to the EEOC the names and addresses of all former exempt employees who were 40 or over at termination and who have been terminated since May 1, 1980.

B. AWARDS TO BONA FIDE CLAIMANTS

The Xerox Corporation shall provide the following to persons identified as discriminated against on the basis of their age:

1. Back Pay

   The amount of the monthly salary lost from the date of termination to the date of settlement, minus any severance pay and minus any pay from subsequent employment.

2. Right of Reinstatement

   The right to be reinstated to a job equivalent to the one from which the former employee was terminated and to a grade and rate of pay identical to that he had when terminated by Xerox. This job shall be in the same geographical area as the former Xerox job. It is agreed that a former employee who declines reinstatement because he has since reached the age at which he had planned to retire does not waive his right to back pay or to adjustment of retirement benefits.

3. Adjustment of Retirement Benefits

   Retirement benefits for those persons who have been terminated and who have vested pension rights shall be adjusted to reflect the monthly amount of money the terminated employee would have received had he retired at age 65. The amount and method of determining and paying out the appropriate adjustment shall be decided composed of EEOC personnel, Xerox employees involved in pension administration, and an outside expert in pension benefits and administration. This committee shall create a formula to be used for computation in the cases of qualified claimants.

   The outside expert will be chosen together by the EEOC and Xerox. This expert shall resolve disputes. in accordance with accepted actuarial principles and standards. The cost of the expert shall be paid by Xerox.

4. Adjustment of Profit Sharing Funds

   The amount of money each employee had in the profit sharing fund shall be adjusted to reflect the amount he would have had had he continued to work until re-retirement. The amount and method of determining and paying out the appropriate adjustment shall be decided in the same manner as described in (3) above and with identical terms as to resolution of disputes and the cost of the expert.

5. Reimbursement for Medical Expenses

   Medical expenses which were were incurred by the former employee or his family after coverage by the Xerox group employee health insurance expired shall be reimbursed by Xerox. Medical expenses shall be defined to include both actual health care costs and the cost of of health insurance premiums incurred by former employees after expiration of Xerox group insurance.

6. Reimbursement for Life Insurance Premiums

   Xerox shall reimburse former employees for the difference in premiums the employee paid for the same insurance coverage after his Xerox employee life insurance expired.

C. CLAIMS PROCEDURE

The claims procedure for members of the class who allege that they were terminated because of discrimination on the basis of age is as follows:

1. The EEOC shall design a questionnaire/ claim form to be sent to potential claimants. Class members who wish to pursue a claim must complete a copy of the questionnaire/ claim form and return it within thirty days (30) of their reciept of the form.

2. Upon receipt of the completed forms, the EEOC shall furnish copies of the forms to counsel for Xerox.

3. Within forty-five (45) days of its receipt of each claim form, Xerox will provide EEOC with information concerning the facts and circumstances surrounding the claimant's termination, together with underlying documents from the claimant's personnel file and with documents regarding other similar employees in the terminees' departments who were not terminated or who were hired within six (6) months of the termination at issue.

4. Counsel for the EEOC will then determine the eligibility of the claimant to back pay or adjustment of retirement benefits according to the terms set out in §B above. Xerox shall have the right to object to such a determination with respect to any individual claim only where the award to any individual exceeds the amounts set out in the terms of this agreement.

5. If there is no objection by Xerox, the award as determined by counsel for the EEOC shall be final.

6. In the event that Xerox does object to the determination by the EEOC, the parties shall submit the question(s) to an arbitrator for resolution. Such arbitrator shall be a member of the American Association of Arbitrators, shall be experienced in age discrimination, and shall be selected by both parties from a list of at least five (5) names. The Xerox Corporation will be liable for the costs incurred by submitting the question to arbitration. The decision of the arbitrator shall be final and shall be binding on all parties, including the claimant.

date

James N. Finney
Associate General Counsel

date

Counsel for the Xerox Corporatio

Philip E. Smith
Associate General Counsel
Xerox Corporation
Stamford, Connecticut

Dear Mr. Smith:

Attached is the Commission's proposed conciliation agreement which we think will resolve the issues raised in our Letter of Violation issued in April, 1984. According to the provisions of the Age Discrimination in Employment Act, the issuance of the Letter of Violation begins a period of conciliation during which the Commission seeks to resolve the apparent violations of the ADEA through an agreement before proceeding to litigation.

We began our investigation of alleged age discrimination by Xerox in 1983. We have continued to investigate new allegations and analyze new evidence as it became available. During the conciliation period we have had three formal meetings as well as several informal conversations. As required by the ADEA we have advised you of the evidence which shows a pattern of age discrimination by your company, of the possibility that these former employees could be awarded backpay should they prevail in a lawsuit, and of the possibility that the Commission would pursue remedies for these apparent violations in litigation. Xerox has been offered many opportunities to explain its position on the allegations in the Letter of Violations. After carefully analyzing the company's explanation of its position on the allegations in the LOV and reviewing materials presented by Xerox during the investigation and conciliation periods, the Commission has concluded that the evidence shows a violation of the ADEA.

The Commission offers this proposed conciliation agreement with great expectations that it will resolve the issues. We will be happy to meet with you to discuss our agreement and to listen to your alternate proposal. If we have not received a response from you within two weeks of your receipt of this proposed agreement, we will consider that you have rejected our offer of settlement and that conciliation has failed.

Sincerely,

James N. Finney,
Associate General Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

John F. Geaney, Jr., Esquire
Steve I. Adler, Esquire
Cole, Geaney, Yamner, Byrne, P.C.
100 Hamilton Plaza - Box D
Paterson, New Jersey 07509

Robert H. Jaffe, Esquire
Jaffe & Schlesinger, P.C.
8 Mountain Avenue
Springfield, New Jersey 17081

EEOC v. *Xerox Corporation*

Gentlemen:

The Commission pursuant to Section 7(b) of the ADEA, will submit a proposed conciliation agreement to the Xerox Corporation in an attempt to resolve the issues of age discrimination charged in our letter of violation issued April 19, 1984. The proposed agreement will include all identified former employees that were victims of Xerox's age discrimination policies that did not opt into the *Lusardi et al.*, v. *Xerox Corporation* lawsuit. We also plan, with your permission, to include in our proposal the names of the seventy (70) victims identified in your December 19, 1984 letter to the Commission. It is my understanding that you had not planned to request an extension, of the March 31, 1983 deadline to include these victims into your certified class.

In our conciliation processs we always attempt to obtain relief for the maximum number of victims that can be identified. If you have additional names of individuals affected by Xerox's discriminatory policies, that are outside the scope of your law suit, please send us the names, addresses and telephone numbers so we can make contact and possibly include them for relief in our proposed agreement.

Thanking you in advance for your cooperation and consideration.

Sincerely,

JAMES N. FINNEY
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N. W.
Washington, D. C. 20507

XEROX

Xerox Corporation
1985
Annual Report

86 15 9641

BECHTEL INFORMATION SERVICES
RECEIVED
MAR 25 1986
GAITHERSBURG MARYLAND

'Directions,' a long-term strategy for the business systems market, is launched in New York City along with an array of new products and systems, called "business solutions."

April

Xerox donates the original automatic copier, the Xerox 914, to the Smithsonian Institution in Washington.

August

Xerox employees showcase their solutions to some work problems at Teamwork '85 Days in Webster, NY, El Segundo, CA, and Mitcheldean, England.

October

Long-Term Debt (continued)

(i) The 11% sterling bonds are redeemable upon 30 days notice, at the election of Rank Xerox Finance (Netherland) B.V., a wholly-owned Netherlands consolidated subsidiary, commencing April 15, 1990, at 100¼% and commencing April 15, 1991 at 100%. Early redemptions shall be for a minimum of 5.0 million pounds sterling or any multiple thereof.

(j) During 1985 Xerox Finance N.V. redeemed $100 million principal value of the 14% notes at 101%. In connection with the original issuance of the 14% notes, Xerox Finance N.V. sold 100,000 warrants, each of which entitled the holder to purchase $1,000 face amount of 13¼% notes due 1987. The warrants were sold at $30 each and expired on August 15, 1985. At December 31, 1985 a total of 99,995 warrants had been exercised of which 77,897 were exercised during 1985.

(k) The interest rates on certain notes are subject to periodic adjustment.

(l) Payments due on long-term debt for the next five years are (in millions): 1986–$69.1; 1987–$245.4; 1988–$267.6; 1989–$160.0; and 1990–$178.7.

Notes Payable and Lines of Credit

Notes payable of $333.8 million and $582.6 million at December 31, 1985 and 1984, respectively, generally represent short-term bank and commercial paper borrowings.

At December 31, 1985, the Company and XCC had unused short-term lines of credit aggregating $200 million with U.S. banks at prime interest rates. The Company maintains compensating balances of not more than 5% of these lines of credit. The Company and XCC also have an $800 million revolving credit agreement with a banking syndicate, generally at prime interest rates, which expires in 1990. The agreement provides for the payment of a commitment fee of ⅛ of 1% per annum on the unused average daily balance. No amounts were outstanding at December 31, 1985 under this agreement. Foreign subsidiaries had unused lines of credit aggregating $463 million in various currencies at prevailing interest rates.

Cumulative Preferred Stock

The Company has 25,000,000 authorized shares of cumulative preferred stock, $1 par value. At December 31, 1985 and 1984, 8,840,205 shares of $5.45 Cumulative Preferred stock were issued and outstanding. These shares have a stated value of $50 per share, are non-voting, and are subject to redemption at the stated value through a sinking fund in which the Company must retire 8.18% of the issue cumulatively each year from 1993 through 2002 and the remaining portion in 2003. The Company has an option to redeem all or part of the issue commencing in 1988 at a redemption price equal to the stated value plus a premium ranging from 50% of the annual dividend in the first year of the option to 10% in the fifth year of the option. Thereafter, the redemption price is the stated value. Each share of preferred stock also has a liquidation preference over common stock for the stated value plus accrued and unpaid dividends.

Litigation

In 1983 an action was brought against the Company in the United States District Court for the District of New Jersey which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act (Act) on behalf of named plaintiffs and a purported class of all persons between the ages of forty and seventy who, since May 1, 1980, had unsuccessfully applied for employment in a salaried position with the Company, or who were employees of the Company in such a position and were denied promotion or were terminated.

At the court's direction, notice of the action and an opportunity to join in the suit was given to all salaried employees within the forty to seventy age group who left the employ of the Company during the period from May 1, 1980 through March 31, 1983, or who were employed by the Company on March 31, 1983. The notice provided that such persons were entitled to join in the suit only if they claim that during the relevant period they were terminated, required to retire or denied equal opportunities for promotion as a result of age discrimination. Approximately 1,300 individuals have indicated they wish to join in the suit. The judge has reserved decision with respect to whether job applicants should be permitted to join in the suit.

The named plaintiffs seek reinstatement for themselves, and they seek for themselves and for members of the class compensatory damages consisting of back pay including fringe benefits, and liquidated damages doubling the amount of compensatory damages if the conduct was wilful. The named plaintiffs also seek compensatory, punitive, exemplary and special damages under state law claims. Plaintiffs also seek injunctive relief.

In 1984, the Company received a letter from the Equal Employment Opportunity Commission (EEOC) alleging that the Commission determined that the Company had violated the Act by following policies and practices which discriminated against salaried employees and former employees in the forty to seventy age group. The EEOC letter, which was in standard form prescribed by EEOC operating procedures, was issued under a general delegation of authority to the EEOC staff without any hearings or formal determinations by the Commission itself. The purpose of the letter was to stop the statute of limitations from running and to commence a conciliation procedure with respect to terminated employees. In 1984, the Company engaged in such conciliation and discussions about the merits of the Company's position with the EEOC. The Company has been informally advised that the EEOC has terminated its proceedings in this matter.

An action has been brought against the Company in the United States District Court for the Northern District of Texas in which a former employee of the Company alleges that he was responsible for the development of certain small Xerox computers, including the Xerox 820, and that various promises to him by the Company were not fulfilled, including bonuses, incentive compensation and royalties for his efforts.

Plaintiff also claims that proprietary information he owned was fraudulently obtained by the Company from him, the Company was unjustly enriched from his proprietary information and he has been slandered by the Company which has interfered with his prospective business opportunities. Plaintiff claims an aggregate of at least $375 million in compensatory and punitive damages on his various claims.

The Company denies any wrongdoing and intends to vigorously defend the foregoing proceedings.

April 17, 1986

MEMO:

TO: Leroy T. Jenkins,

FROM: Carlton L. Preston

SUBJECT: Proposed Conciliation Agreement

Enclosed is the Xerox proposed conciliation agreement and the cover letter to Phil Smith. I put brackets around those sections that you requested additional changes.

April 1986

Philip E. Smith
Associate General Counsel
Xerox Corporation
Stanford, Connecticut

Dear Mr. Smith:

Attached is the Commission's proposed conciliation agreement which we think will resolve the issues raised in our Letter of Violation issued in April, 1984. According to the provisions of the Age Discrimination in Employment Act, the issuance of the Letter of Violation begins a period of conciliation during which the Commission seeks to resolve the apparent violations of the ADEA through an agreement before proceeding to litigation.

We began our investigation of alleged age discrimination by Xerox in 1983. We have continued to investigate new allegations and analyze new evidence as it becomes available. During the conciliation period we have had three formal meetings as well as several informal conversations. As required by the ADEA we have (1) advised you of the evidence which shows a pattern of age discrimination by your company (2) advised you of the possibility that these former employees could be awarded backpay should they prevail in a lawsuit, and (3) advised you of the possibility that the Commission would pursue legal remedies for these apparent violations. Xerox has been offered many opportunities to explain its position on the allegations in the Letter of Violation. After carefully analyzing the Company's explanation of its position and reviewing materials presented by Xerox during the investigation and conciliation period the Commission has concluded that the evidence shows a violation of the ADEA.

The Commission offers this proposed conciliation agreement with great expectations that we can resolve these ADEA violations. We will be available to meet with you to discuss our proposed agreement.

Also, we ask your reconsideration of our earlier requests for your agreement to toll the running of the statute of limitation until the completion of any conciliation discussions.

If we have not received a response from you within two weeks from your receipt of this proposed agreement, we will consider that you have rejected our offer of settlement and that conciliation has failed.

Sincerely,

James H. Finney
Associate General Counsel
Systemic Litigation Services

CONCILIATION AGREEMENT

In the matter of:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

Xerox Corporation

Pursuant to the investigation and the issuance of a Letter of Violation under the Age Discrimination in Employment Act (ADEA) the U.S. Equal Employment Opportunity Commission (Commission) and the Xerox Corporation (Xerox) resolve and conciliate the following:

I. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by Xerox of any violation of the ADEA.

2. This Agreement resolves all issues raised in the investigation and the Letter of Violation. Further the Commission agrees not to initiate litigation against Xerox with respect to matters conciliated in this agreement; however, the Commission reserves all rights to proceed with matters not covered in this Agreement and to secure relief on behalf of those aggrieved persons.

3. Nothing in this Agreement shall be construed to preclude the Commission and/or any aggrieved individual from bringing suit to enforce this Agreement in the event that Xerox fails to perform the promises contained herein.

#3

4. Xerox agrees that it shall comply with all requirements of the ADEA. Xerox further agrees to review its personnel retirement policies to insure that they comply with the 1978 amendment to the ADEA that raised the upper age limitation coverage to 70 years of age, and that there is nothing in the personnel policy, neither expressed nor implied that requires an employee to retire before 70 years of age.

5. Xerox agrees that there shall be no discrimination or retaliation of any kind against any person because of the filing of a charge, giving of testimony or the participation in any manner in the investigation and conciliation of this ADEA proceeding.

6. Xerox shall provide to the Commission, upon request, any information necessary to ascertain the compliance with this Agreement, which includes, but not limited to, the examination and copying of relevant documents.

II. DEFINITIONS

1. Affected Class:

This agreement is entered into by the Commission on behalf of all exempt employees of Xerox and its subsidiaries who have been or were terminated after March 31, 1983, who were aged 40 or over at the time of their termination.

2. Relevant Time Period:

Included in this agreement will be terminations which were effective between March 31, 1983 and the date of this agreement.

3. Terminations:

For the purpose of this agreement termination shall include resignations, retirement, and those who left because of voluntary and involuntary reductions in force.

4. **Xerox:**

When cited in this agreement, Xerox shall include the Xerox Corporation and its domestic subsidiaries.

III. TERMS OF AGREEMENT

A. IDENTIFICATION OF CLASS MEMBERS

The Commission shall furnish to Xerox the names and pertinent information concerning approximately 110 claimants who allege that they were terminated by Xerox on the basis of their age after March 31, 1983. In addition to those persons, Xerox shall furnish to the Commission the names and address of all former exempt employees who were 40 or over at termination and who have been terminated after March 31, 1983.

#1 + 2

B. MONETARY RELIEF FUND

~~approximate~~

put the specific amt in the ltr.

Xerox agrees to establish in a separate account a monetary relief fund ~~in the amount of $5,430,000.00~~ (Five Million ~~Four Hundred Thirty Thousand Dollars~~) within 30 days after the signing of this Agreement to be used exclusively for the back pay relief of the members of the affected class set forth below in paragraph C.

~~Ignore~~

~~[illegible]~~

If the total back pay relief fund exceeds the amount required to fully compensate all aggrieved class members, the excess shall be placed in an interest bearing account and used to hire an outplacement employment agency to assist class members who are unemployed and future terminated employees over 40 years of age to find comparable employment.

C. AWARD TO BONA FIDE CLAIMANTS

Xerox agrees to provide the following relief to members of the affected class:

1. Back Pay

The amount of the monthly salary lost from the date of termination to the date of settlement, minus, any severance pay and minus any pay from subsequent employment.

#5

2. Right of Reinstatement and Training

The right to be reinstated to their former job or a job equivalent in status, grade and rate of pay to their former job. This job shall be in the same geographical area as the former Xerox job. It is agreed that a former employee who declines reinstatement because he has since reached the gate at which he had planned to retire does not waive his right to back pay or to adjustment of retirement benefits.

Each reinstated employee shall have a training assessment performed to determine if training is necessary to up grade their job skills to the level of proficiency maintained prior to their termination.

3. Adjustment of Retirement Benefits

10

Retirement benefits for those persons who have been terminated and who had vested pension rights shall be adjusted to reflect the monthly benefits the terminated employee would have received had he retired at age [illegible]. The amount and method of determining and distributing the appropriate adjustment shall be decided by a committee of Commission personnel, Xerox employees involved in pension administration, and an outside expert in pension retained by EEOC and paid for by Xerox. Any disputes shall be resolved in accordance with accepted actuarial principles and standards.

language which ~~[illegible]~~ describes that specif. will be worked out

4. Adjustment of Profit Sharing Funds

The profit sharing fund shall be adjusted to reflect the amount a terminated employee would have had had they continued to work until retirement. The amount and method of determining and distributing the appropriate adjustment shall be decided in the same manner as described in paragraph (3) above and with identical terms as to resolution of disputes and the cost of the expert.

5. Reimbursement for Medical Expenses

Medical expenses which were incurred by the former employee or his family after coverage by the Xerox group employee health insurance expired shall be reimbursed by Xerox. Medical expenses shall be defined to include both actual health care costs and the cost of health insurance premiums incurred by former employees after expiration of their Xerox group insurance.

6. Reimbursement for Life Insurance Premiums

Xerox shall reimburse former employees for the difference in premiums the employee paid for the same insurance coverage after his Xerox employee life insurance expired.

D. CLAIMS PROCEDURE

The claims procedure for members of the affected class shall be as follows:

1. The Commission shall design a questionnaire/claim form to be sent to potential claimants. Class members who wish to pursue a claim must complete a copy of the questionnaire/claim form and return it within forty-five days (45) of their receipt of the form.

2. The Commission shall furnish copies of the completed forms to counsel for Xerox.

3. Within forty-five (45) days of its receipt of copies of the claim forms, Xerox will provide the Commission with information concerning the facts and circumstances surrounding the claimant's termination, together with underlying documents from the claimant's personnel file and with documents regarding other similarly situated employees in the terminees' departments who were not terminated or who were hired within six (6) months of the termination at issue.

4. Counsel for the Commission will determine the eligibility of the claimant to back pay or adjustment of retirement benefits according to the terms set out in paragraph B above.

5. If there is no objection by Xerox, the award as determined by counsel for the Commission shall be final.

6. In the event that Xerox does object to the determination by the Commission, the parties shall submit the question(s) to an arbitrator for resolution. Such arbitrator shall be member of the American Association of Arbitrators, shall be a experienced in age discrimination, and shall be selected by both parties from a list of at least five (5) names. The Xerox Corporation will be liable for the costs incurred by submitting the question to arbitration. The decision of the arbitrator shall be final and shall be binding on all parties, including the claimant.

#4 + 6

E. RECORD KEEPING AND REPORTING

1. Xerox agrees to designate a member of management to implement this Agreement and to monitor the Company's compliance with the provisions set forth in the Agreement. The designated official will be identified at the signing of this Agreement and will be the contact person concerning questions regarding the compliance or non compliance with any provisions of this Agreement.

2. Xerox agrees to a 5 year term of record keeping and reporting to the Commission on all issues regarding termination of all employees covered by the ADEA. The 5 year term will begin on the date of the signing of this Agreement.

3. Xerox agrees to present to the Commission for review and comment all proposals for reduction in force of employees covered by the ADEA, 60 (Sixty) days prior to the initial date of implementation.

4. Xerox agrees to file annual reports to the Commission documenting their compliance with the terms of this Agreement. The first report will be due be one year from the signing of this Agreement and each successive year thereafter.

5. The report shall include the following:

(a) The total number of Xerox employees by name, date of birth, social security number, date of hire, location, and job classification.

(b) The total number of Xerox employees covered by the ADEA that were terminated during the year by name, date of birth, social security number, location, job classification and type of termination.

(c) The total number of employees hired by Xerox , date of birth, job classification, date of hire, and at what location.

(d) The total number of training assessments performed for reinstated employees by name, location and a summary of the assessment results.

(e) The reports shall be in computer readable tapes with the job family codes and all other materials necessary for the Commission's staff to independently interpret and analyze the data.

Date
James N. Finney
Associate General Counsel

Date
Counsel for the Xerox Corporation

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

Quarterly Report Under Section 13 or 15(d)
of the Securities Exchange Act of 1934

For Quarter Ended June 30, 1986

Commission File Number 1-4471

XEROX CORPORATION
(Exact name of registrant as specified in its charter)

New York
(State or other jurisdiction of incorporation or organization)

16-0468020
(IRS Employer Identification No.)

P.O. Box 1600
Stamford, Connecticut
(Address of principal executive offices)

06904
(Zip Code)

(203) 329-8700
(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15 (d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes x No ____

APPLICABLE ONLY TO CORPORATE ISSUERS:

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Class	Outstanding as of July 31, 1986
Common Stock	97,280,685
Class B Stock	94,901

This document is comprised of 18 pages.

XEROX CORPORATION

Notes to Consolidated Financial Statements

9. In 1983, an action was brought against the Company in the United States District Court for the District of New Jersey which alleges age discrimination in violation of the Federal Age Discrimination in Employment Act (the "Act") on behalf of named plaintiffs and a purported class of all persons between the ages of forty and seventy who, since May 1, 1980 had unsuccessfully applied for employment in a salaried position with the Company, or who were employees of the Company in such a position and were denied promotion or were terminated.

At the court's direction, notice of the action and an opportunity to join in the suit were given to all salaried employees within the forty to seventy age group who left the employ of the Company during the period from May 1, 1980 through March 31, 1983, or who were employed by the Company on March 31, 1983. The notice provided that such persons were entitled to join in the suit only if they claim that during the relevant period they were terminated, required to retire or denied equal opportunities for promotion as a result of age discrimination. Approximately 1,300 individuals have indicated they wish to join in the suit. The judge has reserved decision with respect to whether job applicants should be permitted to join in the suit.

The named plaintiffs seek reinstatement for themselves, and they seek for themselves and for members of the class compensatory damages consisting of back pay including fringe benefits, and liquidated damages doubling the amount of compensatory, punitive, exemplary and special damages under state law claims. Plaintiffs also seek injunctive relief.

On March 18, 1986, the plaintiffs served a motion seeking approval of the Court to file a third amended complaint which would expand the scope of the current lawsuit and add new causes of action. This amended complaint would (i) expand the time period encompassed by the current federal law age discrimination claim; (ii) establish a class of plaintiffs for purposes of litigating newly asserted discrimination claims under state law for the approximately 1300 individuals who have joined the suit; (iii) establish a class of plaintiffs for purposes of litigating a newly asserted breach of employment contract claim under state law; and (iv) assert a tort claim under state law for the named plaintiffs. On June 26, 1986 the Magistrate denied plaintiffs' motion to file a third amended complaint. The Magistrate granted leave to the plaintiffs to renew the motion at a future time.

On July 15, 1986, plaintiffs in such action served a motion for summary judgment or, in the alternative, a presumption of class-wide liability and requesting other relief.

In 1984, the Company received a letter from the Equal Employment Opportunity Commission (the "EEOC") alleging that the Commission determined that the Company had violated the Act by following policies and practices which discriminated against salaried employees and former empoyees in the forty to seventy age group. The EEOC letter, which was in standard form prescribed by EEOC operating procedures, was issued under a general delegation of authority to the EEOC staff without any hearings or formal determinations by the Commission itself. The purpose of the letter was to stop the statute of limitations from running and to commence a conciliation procedure with respect to terminated employees. In 1984, the Company engaged in such conciliation and discussions about the merits of the Company's position with the EEOC. The Company had been informally advised that the EEOC had terminated its proceedings in this matter.

XEROX CORPORATION

Notes to Consolidated Financial Statements

On July 18, 1986 the Company received a letter from the EEOC dated July 14, 1986 alleging that following the conciliation discussions which resulted from the Commission's 1984 letter charging violations of the Act the EEOC has concluded that the evidence shows a violation of the Act. The EEOC's letter is accompanied by a proposed conciliation agreement which seeks, among other things, establishment by the Company of a fund for back pay and adjustment of benefits under the Company's pension and welfare plans for all exempt employees of the Company and domestic subsidiaries who were at or over age forty and were terminated in violation of the Act between March 31, 1983 and the date of the proposed agreement. The proposed agreement would also require reinstatement and training for such employees.

The proposed conciliation agreement relates to terminations following the period of time which was the subject of the EEOC's original 1984 letter and the conciliation discussions which followed. At no time has the Company been given the opportunity to provide evidence with respect to such new period. The Company denies any wrongdoing and intends to vigorously contest the EEOC's allegations and the lack of adequate procedures followed prior to the issuance of its letter.

An action has been brought against the Company in the United States District Court for the Northern District of Texas in which a former employee of the Company alleges that he was responsible for the development of certain small Xerox computers, including the Xerox 820, and that various promises to him by the Company were not fulfilled, including bonuses, incentive compensation and royalties for his efforts.

Plaintiff also claims that proprietary information he owned was fraudulently obtained by the Company from him, the Company was unjustly enriched from his proprietary information and he has been slandered by the Company which has interfered with his prospective business opportunities. Plaintiff claims an aggregate of at least $375 million in compensatory and punitive damages on his various claims.

The Company denies any wrongdoing and intends to vigorously defend the foregoing proceedings.

PART II - OTHER INFORMATION

XEROX CORPORATION

Item 1. Legal Proceedings

On June 26, 1986 the Magistrate in the age discrimination lawsuit pending in the Federal District in New Jersey denied plaintiffs' motion to file a third amended complaint which would have expanded the scope of the lawsuit and add new causes of action. The Magistrate granted leave to the plaintiffs to renew the motion at a future time.

On July 15, 1986, plaintiffs in such action served a motion for summary judgment or, in the alternative, a presumption of class-wide liability and requesting other relief. The Registrant intends to vigorously oppose this motion.

On July 18, 1986 the Registrant received a letter from the Equal Employment Opportunity Commission (the "Commission") dated July 14, 1986 alleging that following the conciliation discussions which resulted from the Commission's 1984 letter charging violations of the Age Discrimination in Employment Act (the "Act"), the Commission has concluded that the evidence shows a violation of the Act. The Commission's letter is accompanied by a proposed conciliation agreement which seeks, among other things, establishment by the Registrant of a fund for backpay and adjustment of benefits under the Company's pension and welfare plans for all exempt employees of the Registrant and domestic subsidiaries who were at or over age forty and were terminated in violation of the Act between March 31, 1983 and the date of the proposed agreement. The proposed agreement would also require reinstatement and training for such employees.

The proposed conciliation agreement relates to terminations following the period of time which was the subject of the Commission's original 1984 letter and the conciliation discussions which followed. At no time has the Registrant been given the opportunity to provide evidence with respect to such new period. The Registrant denies any wrongdoing and intends to vigorously contest the Commission's allegations and the lack of adequate procedures followed prior to the issuance of its letter.

Item 4. Submission of Matters to a Vote of Security Holders

The Annual Meeting of Shareholders of Xerox Corporation was duly called and held on May 15, 1986 at The Westin Bonaventure Hotel in Los Angeles, California.

Proxies for the meeting were solicited on behalf of the Board of Directors of the Registrant pursuant to Regulation 14A of the General Rules and regulations of the Commission. There was no solicitation in opposition to the Board of Directors' nominees for election as directors as listed in the Proxy Statement, and all of such nominees were elected.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

File Copy
Submitted
July 4, 1986

Philip E. Smith
Associate General Counsel
Xerox Corporation
Stanford, Connecticut 06904

Dear Mr. Smith:

Attached is the Commission's proposed conciliation agreement which we think will resolve the issues raised in our Letter of Violation issued in April, 1984. According to the provisions of the Age Discrimination in Employment Act, the issuance of the Letter of Violation begins a period of conciliation during which the Commission seeks to resolve the apparent violations of the ADEA through an agreement before proceeding to litigation.

We began our investigation of alleged age discrimination by Xerox in 1983. We have continued to investigate new allegations and analyze new evidence as it becomes available. During the conciliation period we have had three formal meetings as well as several informal conversations. As required by the ADEA we have (1) advised you of the evidence which shows a pattern of age discrimination by your company; (2) advised you of the possibility that these former employees could be awarded backpay should they prevail in a lawsuit; and (3) advised you of the possibility that the Commission would pursue legal remedies for these apparent violations. Xerox has been offered many opportunities to explain its position on the allegations in the Letter of Violation. After carefully analyzing the Company's explanation of its position and reviewing materials presented by Xerox during the investigation and conciliation period the Commission has concluded that the evidence shows a violation of the ADEA.

The Commission offers this proposed conciliation agreement with great expectations that we can resolve these ADEA violations. We will be available to meet with you to discuss our proposed agreement.

Also, we ask your reconsideration of our earlier requests for your agreement to toll the running of the statute of limitation until the completion of any conciliation discussions.

If we have not received a response from you within two weeks from your receipt of this proposed agreement, we will consider that you have rejected our offer of settlement and that conciliation has failed.

Sincerely,

James N. Finney
Associate General Counsel
Systemic Litigation Services

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

CONCILIATION AGREEMENT

In the matter of:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

Xerox Corporation

Pursuant to the investigation and the issuance of a Letter of Violation under the Age Discrimination in Employment Act (ADEA) the U.S. Equal Employment Opportunity Commission (Commission) and the Xerox Corporation (Xerox) resolve and conciliate the following:

1. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by Xerox of any violation of the ADEA.
2. This Agreement resolves all issues raised in the investigation and the Letter of Violation. Further the Commission agrees not to initiate litigation against Xerox with respect to matters conciliated in this agreement; however, the Commission reserves all rights to proceed with matters not covered in this Agreement and to secure relief on behalf of those aggrieved persons.
3. Nothing in this Agreement shall be construed to preclude the Commission and/or any aggrieved individual from bringing suit to enforce this Agreement in the event that Xerox fails to perform the promises contained herein.
4. Xerox agrees that it shall comply with all requirements of the ADEA. Xerox further agrees to review its personnel retirement policies to insure that they comply with the 1978 amendment to the ADEA that raised the upper age limitation coverage to 70 years of age, and that there is nothing in the personnel policy, neither expressed nor implied that requires an employee to retire before 70 years of age.
5. Xerox agrees that there shall be no discrimination or retaliation of any kind against any person because of the filing of a charge, giving of testimony or the participation in any manner in the investigation and conciliation of this ADEA proceeding.
6. Xerox shall provide to the Commission, upon request, any information necessary to ascertain the compliance with this Agreement, which includes, but not limited to, the examination and copying of relevant documents.

II. DEFINITIONS

1. Affected Class:

This agreement is entered into by the Commission on behalf of all exempt employees of Xerox and its subsidiaries who have been or were terminated after March 31, 1983, who were aged 40 or over at the time of their termination.

2. Relevant Time Period:

Included in this agreement will be terminations which were effective between March 31, 1983 and the date of this agreement.

3. Terminations:

For the purpose of this agreement termination shall include resignations, retirement, and those who left because of voluntary and involuntary reductions in force.

4. Xerox:

When cited in this agreement, Xerox shall include the Xerox Corporation and its domestic subsidiaries.

III. TERMS OF AGREEMENT

A. IDENTIFICATION OF CLASS MEMBERS

The Commission shall furnish to Xerox the names and pertinent information concerning approximately 110 claimants who allege that they were terminated by Xerox on the basis of their age after March 31, 1983. In addition to those persons, Xerox shall furnish to the Commission the names and address of all former exempt employees who were 40 or over at the time of their voluntary or involuntary termination and who have been so terminated after March 31, 1983.

B. MONETARY RELIEF FUND

Xerox agrees to establish in a separate account a monetary relief fund within 30 days after the signing of this Agreement to be used exclusively for the back pay relief of the members of the affected class set forth below in paragraph C.

C. AWARD TO BONA FIDE CLAIMANTS

Xerox agrees to provide the following relief to members of the affected class:

1. Back Pay

The amount of the monthly salary lost from the date of termination to the date of settlement, minus, any severance pay and minus any pay from subsequent employment.

2. Right of Reinstatement and Training

The right to be reinstated to their former job or a job equivalent in status, grade and rate of pay to their former job. This job shall be in the same geographical area as the former Xerox job. It is agreed that a former employee who declines reinstatement because he has since reached the age at which he had planned to retire does not waive his right to back pay or to adjustment of retirement benefits. Each reinstated employee shall have a training assessment performed to determine if training is necessary to up grade their job skills to the level of proficiency maintained prior to their termination.

3. Adjustment of Retirement Benefits

Retirement benefits for those persons who have been terminated and who had vested pension rights shall be adjusted to reflect the monthly benefits the terminated employee would have received had he retired at age 70. The amount and method of determining and distributing the appropriate adjustment shall be decided by a committee of Commission personnel, Xerox employees involved in pension administration, and an outside pension expert retained by EEOC and paid for by Xerox. Any disputes shall be resolved in accordance with accepted actuarial principles and standards.

4. Adjustment of Profit Sharing Funds

The profit sharing fund shall be adjusted to reflect the amount a terminated employee would have had had they continued to work until retirement. The amount and method of determining and distributing the appropriate adjustment shall be decided in the same manner as described in paragraph (3) above and with identical terms as to resolution of disputes and the cost of the expert.

5. Reimbursement for Medical Expenses

Medical expenses which were incurred by the former employee or his family after coverage by the Xerox group employee health insurance expired shall be reimbursed by Xerox. Medical expenses shall be defined to include both actual health care costs and the cost of health insurance premiums incurred by former employees after expiration of their Xerox group insurance.

6. Reimbursement for Life Insurance Premiums

Xerox shall reimburse former employees for the difference in premiums the employee paid for the same insurance coverage after his Xerox employee life insurance expired.

D. CLAIMS PROCEDURE

The claims procedure for members of the affected class shall be as follows:

1. The Commission shall design a questionnaire/claim form to be sent to potential claimants. Class members who wish to pursue a claim must complete a copy of the questionnaire/claim form and return it within forty-five days (45) of their receipt of the form.

2. The Commission shall furnish copies of the completed forms to counsel for Xerox.

3. Within forty-five (45) days of its receipt of copies of the claim forms, Xerox will provide the Commission with information concerning the facts and circumstances surrounding the claimant's termination, together with underlying documents from the claimant's personnel file and with documents regarding other similarly situated employees in the terminees' departments who were not terminated or who were hired within six (6) months of the termination at issue.

4. Counsel for the Commission will determine the eligibility of the claimant to back pay or adjustment of retirement benefits according to the terms set out in paragraph B above.

5. If there is no objection by Xerox, the award as determined by counsel for the Commission shall be final.

6. In the event that Xerox does object to the determination by the Commission, the parties shall submit the question(s) to an arbitrator for resolution. Such arbitrator shall be member of the American Association of Arbitrators, shall be a experienced in age discrimination, and shall be selected by both parties from a list of at least five (5) names. The Xerox Corporation will be liable for the costs incurred by submitting the question to arbitration. The decision of the arbitrator shall be final and shall be binding on all parties, including the claimant.

E. RECORD KEEPING AND REPORTING

1. Xerox agrees to designate a member of management to implement this Agreement and to monitor the Company's compliance with the provisions set forth in the Agreement. The designated official will be identified at the signing of this Agreement and will be the contact person concerning questions regarding the compliance or non compliance with any provisions of this Agreement.

2. Xerox agrees to a 5 year term of record keeping and reporting to the Commission on all issues regarding voluntary and involuntary termination of all employees covered by the ADEA. The 5 year term will begin on the date of the signing of this Agreement.

3. Xerox agrees to present to the Commission for review and comment all proposals for reduction in force of employees covered by the ADEA, 60 (Sixty) days prior to the initial date of implementation.

4. Xerox agrees to file annual reports to the Commission documenting their compliance with the terms of this Agreement. The first report will be due one year from the signing of this Agreement and each successive year thereafter.

5. The report shall include the following:

(a) The total number of Xerox employees by name, date of birth, social security number, date of hire, location, and job classification.

(b) The total number of Xerox employees covered by the ADEA that were terminated during the year by name, date of birth, social security number, location, job classification and type of termination.

(c) The total number of employees hired by Xerox , date of birth, job classification, date of hire, and at what location.

(d) The total number of training-assessments performed for reinstated employees by name, location and a summary of the assessment results.

(e) The reports shall be in computer readable tapes with the job family codes and all other materials necessary for the Commission's staff to independently interpret and analyze the data.

Date

James N. Finney
Associate General Counsel

Date

Counsel for the Xerox Corporation

Xerox Corporation
P. O. Box 1600
Stamford, Connecticut
203 329-8700

Office of General Counsel

XEROX

July 23, 1986

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Services
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Dear Mr. Finney::

I am writing in reply to your letter of July 14, 1986, which we received on July 18, 1986. Your letter and the conclusions that you state the Commission has reached are a surprise to us and, we believe, are inconsistent with what has actually transpired in this matter.

In order to assist in clarifying our position, I believe that it would be helpful to summarize the chronology of prior events:

- In February, 1984, Xerox received from the EEOC a letter of investigation into alleged violations of ADEA. This letter requested voluminous documentary and computer data relating to the calendar years 1980 through 1983.
- In March, 1984, Xerox met with EEOC representatives to clarify the scope of the investigation being undertaken by the EEOC and to reach agreement on the data to be supplied by Xerox.
- In late March and early April, 1984, Xerox began to produce to the EEOC the agreed upon materials, including many documents and the initial set of computer tapes.
- On April 19, 1984, and before Xerox had completed its production of data, the EEOC issued a Letter of Violation under ADEA and started the statutory process of conciliation. While we were somewhat dismayed that the EEOC would issue an LOV before the EEOC had an opportunity to review the data being supplied by Xerox and to listen to our side of the case, we agreed to participate in the conciliation process and to complete the submission of data.
- Throughout the time period between May and August, 1984, there were various written and telephonic contacts between the EEOC and Xerox. Xerox completed its submission of data. There was a meeting to assist the EEOC in analyzing the computer tapes. There was one conciliation meeting at which the EEOC indicated that it had anecdotal evidence relating to the 1980-1983 time period. Xerox asked for information and offered to investigate such individual cases.
- In September, 1984, a full day meeting was held with EEOC representatives, including yourself, at which Xerox presented information about the personnel activities in question and a statistical analysis of what actually happened. The EEOC presented its preliminary statistical analysis and provided Xerox with one Xerox memorandum about which the EEOC was concerned. This discussion was limited to the years 1980-1983. Subsequent to the meeting, Xerox provided to the EEOC an explanation of the memorandum about which the EEOC had expressed concern.

XEROX

- Subsequent to the September meeting, the EEOC requested that Xerox provide the names of all persons who participated in voluntary reductions in force in the years 1980-1983. At a meeting in the EEOC's offices in November, 1984, Xerox informed you that we would not provide such names and explained why we took this position. The EEOC at that meeting agreed to provide Xerox promptly with information on approximately 100 cases in which individuals had indicated to the EEOC that they felt age had been a factor in their termination. Xerox agreed to investigate these cases and meet with the EEOC to discuss them. This was the last meeting between Xerox and the EEOC.

- In January, 1985, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. There was no further contact until January, 1986.

- In January, 1986, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. Commission Counsel informed Xerox for the first time that these cases were "outside the Lusardi time frame, that is after March 31, 1983." The Xerox response was that this was a new subject matter which we would have to consider upon receipt of details from the EEOC. There was no further contact until receipt of your letter on July 18, 1986.

Several conclusions flow from the chronology described above:

- Xerox has never been requested to provide data, documentation or to explain its position for the years 1984, 1985 or 1986 and has not been given the opportunity to do so.

- Except for the January, 1986 telephone call, all discussions between Xerox and the EEOC have been limited to the years 1980-1983.

XEROX

The basic point is that, during our conciliation proceedings covering the period 1980-1983, Xerox was never told by the EEOC until the January, 1986, telephone call that the 110 cases to which you now refer actually encompass a "post-Lusardi" time frame. Xerox has repeatedly informed the EEOC that, given sufficient information, it would investigate and address individual claims of terminations presented to it by the EEOC. We are still ready to do so with respect to the new claims you mentioned. I called your office on July 21, 1986, to set up a meeting and am awaiting your response.

Sincerely yours,

Philip E. Smith
Assistant General Counsel
Personnel and Corporate Affairs

PES/htl

August 7, 1986

TO Carlton

FROM Judy

SUBJECT Response to Finney after Smith's request for meeting

XEROX STATISTICAL DATA

Our request for data from Xerox was made in February, 1984; therefore, we asked for data covering the period May 1, 1980 through December 31, 1983. After analyzing this data we were able to make several assertions, with reasonable confidence, as to the apparent age discrimination practiced by Xerox in the terminations during this period. This statistical data, along with documentary and anecdotal evidence, led us to conclude that Xerox developed and implemented a conscious and deliberate policy of terminating older workers in order to save money.

We made the decision, in February 1986, not to intervene in the Lusardi suit because those plaintiffs appear to be ably represented by private counsel. We narrowed our focus to the potential plaintiffs who were terminated after the Lusardi time period which ends March 31, 1983. These people are a subset of the group on which our statistical analysis was conducted. Of the 31 persons who have returned our questionnaires, 21 were terminated in 1983 and so would be included in our analysis. The latest termination of any person in our group was in August, 1984.

It is clear that Xerox stopped the massive terminations after the Lusardi suit was filed. Our initial analysis found that the greatest impact by age seemed to be a reflection of the Bridge to Retirement program which many plaintiffs allege they were forced to take. It is clear that Xerox also ended this program after the lawsuit was filed. It is not surprising that only one of the 31 people we might represent left in the Bridge to Retirement in August, 1983.

Beyond the effects of the Bridge to Retirement, we have statistical analyses, anecdotal and documentary evidence which show a pattern of discrimination on the basis of age. It seems reasonable to conclude that this pattern is one within which the employment decisions affecting our 31 people were also made. Because these people are a subset of thousands of employees upon which the statistical analysis is based, it seems reasonable to include them in our overall assessment of the practices implemented by Xerox. We can realistically assess the evidence relating to these people only in the context of what was happening throughout the company.

Another factor which leads us to believe that our statistical analysis properly includes these people is that the expert report done by Dr. Reisler for the plaintiffs both verifies and amplifies his initial findings he made while working for us. After deposing Dr. Medoff, the Xerox expert who made a presentation to us in the September, 1984 meeting, the plaintiffs have filed a motion to strike his expert report. He revealed during his deposition that the analysis undertaken for the EEOC meeting was done by Xerox employees and some analyses represented were not performed at all. During his deposition he virtually disavowed both the report to EEOC and his expert report in the Lusardi suit. Xerox apparently continues to exclude any analysis of voluntary terminations and insists the only proper investigation is of involuntary terminations. Of course the number of IRIFS is quite small and the real issue, both in that suit and in our action, is on how voluntary were the VRIFS.

RESPONSE TO PHIL SMITH

The position of Xerox remains constant. They have responded to each presentation we have made with the request that we furnish the evidence of age discrimination we have with respect to individuals and the company will investigate. The latest letter from Smith fails to respond to our settlement proposal and fails to set out any basis upon which we could negotiate. While Xerox consistently says it wants to cooperate, it just as consistently makes clear that any discussion is limited to its terms. Its terms do not even include any statement that it will negotiate anything.

For us to meet with Xerox on its terms and present our evidence with no quid pro quo seems to us to be harmful to our case and to our strategy in resolving this case. Individual evidence as to 31 people, which is all Xerox is willing to consider, is both trivial and inaccurate in the context of the alleged discriminatory actions taken by Xerox. It is interesting to note that Smith's letter uses the same language as the recent Xerox motion to decertify the class. In that motion Xerox asserts that the plaintiffs have no common issues and that evidence can only be assessed on an individual basis.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 18, 1986

TO: : James N. Finney
Associate General Counsel

THRU: : Leroy T. Jenkins
Assistant General Counsel

FROM: : Carlton L. Preston
Judy L. Mathis
Trial Attorneys

SUBJECT: : Conciliation Recommendation, EEOC v Xerox Corporation

RESPONSE TO PHIL SMITH'S LETTER

Attached is our draft response to Philip Smith's reply to our letter of July 14, 1986, for your review and comment. As you know, Mr Smith did not respond to the conciliation document that was attached to the letter but, proceeded into a chronology of events that stopped short of all of the facts. For example, page one, paragraph seven, he states that between May and August 1984 there was various communications between the Commission and Xerox and implied that Xerox had completed the Commission's February, 1984 request for computer data. The reasons for that communications was that between May and August, 1984 Xerox had assured us verbally and in writing that the computer data they sent us was complete and with the proper documentation for our computer experts to analyze. Their information was completely false. The Commission wasted time and money searching for the operating codes and the documentation required to interpret the data. They did not exist in the data initially submitted, notwithstanding Xerox's assurance on numerous occasions that it was there. It took two more submission of data and a special meeting with the experts before we could substantiate the fact that they had not given us what we requested. Moreover, they did not comply with our February 1984 request for data until seven months later one week prior to the conciliation meeting.

Further in paragraph seven of his letter, Mr. Smith's statement that the Commission promised that we would offer individual anecdotal evidence for Xerox to investigate the allegations on an individual basis is not true. We did offer some anecdotal evidence at the September, 1984 conciliation meeting in support of the statistical evidence of the class allegation of age discrimination, but Xerox was informed of the its class wide implications.

Our July 14 letter to Mr. Smith was an expressed intent to provide Xerox with a document that could be used to begin the resolution of issues in the Letter of Violation. Xerox has been very deliberate in their communications with the Commission. They have never explicitly expressed their intent not to conciliate on a class basis for fear that we will send a failure of conciliation notice. However, we do have some insight into their bottom line position. In their motion to decertify the class in the Lusardi case, scheduled for argument in mid September, Xerox asserts that the Lusardi plaintiffs have no common issues and that the evidence can only be assessed on an individual basis. We can concluded from past actions that they will take a similar position with the Commission when pushed on the class allegations. Xerox has never articulated a commitment not to conciliate this case on the basis of class allegations contained in the Letter of Violation. We believe it is imperative that they make a commitment to conciliate on the issues in the Letter of Violation or inform us that they will not conciliate on the the class issues before we submit the thirty-one individuals that we plan to represent.

LETTER TO THE POST LUSARDI CLAIMANTS

In our meeting on July 30, 1986 we agreed that we would make one last attempt to contact the post Lusardi claimants that responded to our questionnaire sent in February 1986. We mailed approximately 110 questionnaires, 38 claimants responded. Seven of the 38 were eliminated because they were bargaining unit employees.[1] The remaining employees received the certified letters but did not return the questionnaires. We made an attempt to contact these claimants a second time by telephone but with limited success. The attached draft letter is the final attempt to contact them and determine their intent, if any, in participating in this case. The letters will not be sent to those claimants that have indicated, in our telephone contact, that they were not interested.

STATISTICAL DATA OF THE 31 CLAIMANTS

The statistical analyses performed by DBS Corporation covered the period from May 1, 1980 through December 31, 1983. After analyzing this data, DBS was able to conclude with reasonable confidence that Xerox Corporation participated in a pattern of age discrimination by terminating employees over 40 years old. In our February meeting, we narrowed our focus to the Lusardi plaintiffs that were terminated after March 31, 1983. These people are a subset of the group on which our statistical analysis was conducted. Of the 31 claimants who responded to our questionnaire, 21 were terminated in 1983 therefore they were included in the DBS analysis. The remaining 10 were terminated in 1984.

It appears that Xerox stopped the massive terminations after the Lusardi suit was filed. Our initial analysis found that the greatest impact by age seemed to be a reflection of the Bridge to Retirement program which many plaintiffs allege they were forced to take. It is clear that Xerox also ended this program after the lawsuit was filed. It is not surprising that only one of the 31 claimants we represent left in the Bridge to Retirement program in August 1983.

Beyond the effects of the Bridge to Retirement program we have statistical analyses, anecdotal and documentary evidence which show a pattern of discrimination on the basis of age. It seems reasonable to conclude that this pattern is one within which the employment decisions affecting our 31 people were also made. Because these people are a subset of thousands of employees upon which the statistical analyses are based, it seems reasonable to include them in our overall assessment of the practices implemented by Xerox. We can realistically assess the evidence relating to these people only in the context of what was happening throughout the company.

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[1] Our Letter of Violations covered only exempt employees.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

name
address
city, state

Dear

The Equal Employment Opportunity Commission is in the final stages of the investigation of age discrimination violations by the Xerox Corporation. In February of this year we sent you a questionnaire requesting your assistance in our investigation of Xerox. As of this date our records indicate that you did not return the questionnaire. If you think that you were terminated by Xerox because of age discrimination and desire the Commission to investigate and conciliate your allegations, either return the questionnaire immediately or contact this office within ten days of the receipt of this letter. You may contact Judy Mathis or Carlton L. Preston, Equal Employment Opportunity Commission, Systemic Litigation Services, 2401 E Street N. W. Washington, D.C. 20507, (202) 634-6865.

If we have not received your questionnaire or you have not contacted the Commission within the ten day time period, we will assume that you are not interested in pursuing your case and will close your file.

Time is of the essence.

Sincerely,

Carlton L. Preston
Judy Mathis
Trial Attorneys

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 18, 1986

Philip E. Smith, Esq.
Associate General Counsel
P.O. Box 1600
Stamford, CT 06904

Dear Mr Smith:

We received your letter of July 23, 1983. Thank you for responding so quickly to our July 14, 1986 letter to you.

The main objective of our July 14th letter and the attached proposed conciliation agreement was to present a document that could be the starting point at which the Commission and Xerox could meet and begin substantive conciliation negotiations to resolve the issues in the Letter of Violation (LOV), as required by Section 7(b) of the ADEA. However, Xerox did not address our proposed conciliation agreement and offered only to address individual allegations of termination.

Xerox has consistently requested that the Commission submit the names of individually terminated employees so Xerox can investigate the individual allegations of each employee. We are amenable to providing the names of individual employees, but it is the Commission's position that these individuals can not be viewed in isolation, but as members of the class of employees discussed in our statistical analyses presented at our meeting on September 24, 1985, and as a part of the pattern and practice of age discrimination described in the LOV.

We believe it would be counter productive to meet and discuss only the individual claims, as you proposed in your letter. However, we are willing to meet and discuss the individual claims within the context of the class allegaions in our LOV and the statistical findings. We had high expectations when we sent you the conciliation agreement that Xerox would review the terms as they were proposed. We are open to any counter proposal that adequately addresses the class allegations.

While we feel your response letter did not address our proposed conciliation agreement, we remain optimistic that Xerox has not ruled out the possibility of conciliating this case. We hope you are willing to respond to the issues in the Letter of Violation and the proposed agreement, so we can reach a quick and equitable resolution of this case.

Your earliest consideration of this matter will be appreciated.

Sincerely

James N, Finney
Associate General Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 11, 1986

Philip E. Smith, Esq.
Associate General Counsel
P.O. Box 1600
Stamford, CT 06904

Dear Mr Smith:

This letter is a follow up to our recent telephone conversation.

As I indicated, the main objective of our July 14th letter and the attached proposed conciliation agreement, was to present a document that could be the starting point in which the Commission and Xerox could meet and begin substantive conciliation negotiations to resolve the issues in the Letter of Violation (LOV), as required by Section 7(b) of the ADEA. However, Xerox did not address our proposed conciliation agreement and offered only to address individual allegations of termination.

Xerox has consistently requested that the Commission submit the names of individually terminated employees so Xerox can investigate the individual allegations of each employee. We are amenable to providing the names of individual employees who have alleged age discrimination, as well as the names of those individuals mentioned for comparative purposes. It is the Commission's position, however, that these individuals can not be viewed in isolation. They must be regarded as members of the class of employees discussed in our statistical analyses presented at our meeting on September 24, 1985, and as a part of the pattern and practice of age discrimination described in the LOV.

During our telephone conversation you expressed a willingness to provide information regarding the post March 31, 1983 individual claims. In the interest of good faith conciliation, attached is a list of information we are requesting you to provids in order that we may discuss specific claims of age discrimination. However, this should not be interpreted as an abandonment, of our class allegations, but as a starting point of negotiations. We trust that your offer to provide the information is still open within the context of this position.

The request has been structured as narrowly as possible to help facilitate a expeditious response. We have categorized the request by facility, group and division when it was possible.

If additional information or clarification is needed by your staff, please feel free to have them contact Carlton L. Preston or Judy Mathis. If further clarification of our earlier telephone conversation is deem necessary, please contact me.

It would be useful in working through this matter at this stage if indeed the running of the statute of limitation was tolled. You will recall our discussion on this point and you indicated that you were amenable to do so.

Thanking you in advance for your earliest consideration of these requests.

Sincerely,

James N. Finney
Associate General Counsel

Attachment

INFORMATION REQUEST

Facility
Akron, Ohio

Information Needed

Names, ages, qualifications, performance history, salary, of Senior Technical Representatives in the Akron Service Department from January 1, 1983 - December 31, 1983

Facility
Atlanta, Georgia

Information Needed

For all exempt employees of the Atlanta Refurbishing Group as of 8-1983 to 1984, their names, ages, date of hire, performance history, qualifications, salaries, positions, and locations. Same information for all of the employees that left the facility when the operation ended in Atlanta, along with a statement as to whether they left Xerox or whether they transferred to another facility.

Facility
Chicago, Illinois

Information Needed

Names, ages, performance history, salary of the 26 Reproduction Center Managers from January 1983 to January, 1984, along with a statement of their current positions with Xerox. If they have left Xerox, indicate the date and reason they left.

Facility
Chicago, Illinois

Information Needed

Names, ages, salaries, qualifications, date of hire, performance history, of the claims representatives in the US Insurance Group Crum & Forster in Chicago; from January 1, 1984 through December 31, 1984.

Facility
Columbus, Ohio

Information Needed

Names, ages, qualifications, performance history, date of hire, salary of exempt employees who were transferred elsewhere when Columbus facility closed in 1983. Also give the current positions of those employees still working for Xerox.

Facility
Diablo, Fremont, California

Information Needed

Names, ages, performance history, date of hire, qualifications of manufacturing engineers (Tech Specialist) at the Diablo facility as of January 1, 1983 through December 31, 1983. The same information for manufacturing engineers who were transferred to other Xerox facilities subsequent to August 31, 1983 and until the Diablo facility closed. Qualifications, previous position, age of person(s) that filled the Maintenance Services Facility Manager's position in 1983-84. Also their current position with Xerox.

Facility
Diablo, Haywood, California

Information Needed

Ages, performance history, positions, salary, date of hire, current positions of senior supervisors that left when the Diablo System closed. Data on Diablo Irvine facility; name, age, performance history of persons appointed to positions the same or similar to, senior supervisor from January 1, 1983 to December 31, 1984.

Facility
Diablo, Fremont, California

Information Needed

Names, ages, performance history, salary, date of hire, current positions of engineers at Diablo as of January 1, 1984 through December 31, 1984 - same for those engineers who transferred to other Xerox facilities when Diablo closed. Current positions of those who are still employed by Xerox.

Facility
Dallas, Texas

Information Needed

Name, ages, performance history, salary, qualifications, former positions, date of appointment of the new Regional Manager(s) in Dallas, Texas from May 1983 and May 1984. Names, ages, performance history; salaries; qualifications of all persons who filled management positions in OPD from January 1, through December 31, 1983 and 1984.

Facility
Dallas, Texas

Information Needed

Names, ages, qualifications, salaries, performance history, date of hire, current positions of persons who were premium auditors in the Dallas Region as of 7-1-83; the same information for premium auditors in this group as of 7-1-84.

Facility
Houston, Texas

Information Needed

Name, age, position, salary, performance history, date of hire, current position of all premium auditors in U.S. Insurance Group in Houston Region as of January 1, 1984 through December 31, 1984. Name, salary, performance history, former position of persons filing the manager of auditing position and the date the position was filled after January 1, 1984.

Facility
Houston, Texas

Information Needed

Names, age, qualifications, performance history, date of hire, positions, salaries of sales personnel at the Houston Reproduction Center between 12/83 and 12/31/84.

Names of exempt employees who transfered from the Center from January 1, 1983 through December 31, 1983, qualifications, performance evaluations, positions, salaries, and location after transfer.

Names, ages, qualifications, performance history of managers of Reproduction Centers in Los Angeles, Chicago, Boston and San Francisco as of 12/1/83 and 12/84.

Facility
New Orleans, Louisiana

Information Needed

Names, ages, qualifications previous positions, performance history, date of hire of all employees in the Administration Group, ISG Division as of January 1, 1984 through December 31, 1984. Personnel profile of the Customer Service Department before and after the operation moved to Dallas. Names of all persons placed in training prior to the Dallas move and six months after the move, type of training and the duration.

Facility
New York, New York

Information Needed

Names, ages, qualifications, salaries performance history, of account executives in downtown office of New York state ISD team from 6/83 to 12/84.

Facility
Middletown, Connecticut

Information Needed

Names, ages, salaries, performance history, date of hire of Technical Reps on Team 27 as of 12-83 and as of 12-84. Names, ages, date of hire, salaries, performance histories of Tech Reps on the other 12 teams of OPD in the New York City area as of 12-84.

Facility
Middletown, Connecticut

Information Needed

Names, ages, performance history; qualifications of all persons who filled all editor positions in 1984 in the K through 8 Division The same information for all personnel from January 1, 1983 through December 31, 1984 in the K through 8 Division.

Facility
Oakbrook, Illinois

Information Needed

Names, ages, performance history, salary, and date of hire of exempt manufacturing engineers in Central Refurbishing and Condition Center, Oakwood, IL. as June 1983 through June 1984.

Facility
Pasadena, California

Information Needed

Names, ages, qualification, performance history, salaries of the approximately 10 persons in the Reproduction Dept. as of 6-1-83, names of those terminated by Xerox in the divestiture. Names, ages, qualifications, performance history of person(s) who filled the Supervisory Position(s) in Production Services who stayed in Xerox after the divestiture.

Facility
Pasadena, California

Information Needed

Names, ages, qualifications, performance history, date of hire, salary of person(s) in the position of Configuration Specialist (or the position(s)that replaced that job title) as of September 31, 1983 through September 31, 1984.

Facility
Phoenix, Arizona

Information Needed

Names, ages, performance history, date of hire, salaries, qualifications; positions, of sales reps. as of 6-1-83 through 6-1-84 in the Business Products Division.

Facility
Pomona, California

Information Needed

Names, ages, salary, qualifications, performance history, date of hire of the exempt employees who were transferred to Loral. Same information for the employees who remained at Xerox.

Names, ages, salary, qualification, performance history of the person(s) who filled the maintenance supervisor position left at Xerox. If the job changed, please list the new title.

Facility
San Antonio, Texas

Information Needed

Names, ages, performance history, date of hire, salary qualifications of Claims Supervisors in the San Antonio Region 1/1/84 to 1/1/85.

Facility
Santa Ana, California

Information Needed

Names, ages, performance history, salaries, former positions of current managers at the 10 administrative operation centers. Same information for the person(s) that filled any vacancy at that position from January 1, 1984 through January 31, 1985.

Facility
Santa Clara, California

Information Needed

Names, ages, performance history; positions, qualifications, salaries of all engineers employed from 10-1-83 through 10-1-84 at Versatec, Santa Ana, California. Same information for all engineers hired during that period.

Facility
Webster, New York

Information Needed

Names, ages, performance history, salaries of VRIF's Component Manufacturing Organization from 1/1/83 to 1/1/84, names, ages, performance in-history, qualifications, date of hire of Manufacturing engineers in the group as of 6-1-83; positions of those employees as of 7-1-84.

Facility
Webster, New York

Information Needed

Names, ages, performance history, date of hire, qualifications of manufacturing engineers in the Division of Industrial Engineering as of 6-1-83; positions of those employees as of 6-1-84; names, ages, performance history, current positions of engineers transferred out of the groups during January 1, 1983 through January 1, 1984. List any title change for manufacturing engineers on or subsequent to a transfer, reassignment or any movement to another work station.

Facility
Webster, New York

Information Needed

Names, ages, performance history, qualifications of all managers employed in RM TEchnical Operations Division between 12-1-83 and 12-1-84. Names, ages, qualifications performance history previous and current positions of person appointed Model Shop Manager in 12-83 between 1-84. Names, ages, performance history, qualifications, date of hire of engineers in group as of 7-1-83; positions of those employees of 7-1-84; names, ages, qualifications; performance history engineers who transferred out of the group during the years 1983 and 1984.

Facility
Webster, New York

Information Needed

Purchasing Department and Production Control Department: names, ages, qualifications, performance history, positions, date of transfer of any person who was transferred into or hired into the depts between 1-83 and 7-84.

Facility
Webster, New York

Information Needed

Names, ages, performance history, qualifications, date of hire of engineers in RMG group as of 7-1-83, positions of those employees of 7-1-84; names, ages, qualifications, performance history of engineers who transferred out of the group during those years. If job title is different, please list the new title. Names, ages, performance history, qualification, job titles of personnel in the Computer Graphic Department from January 1, 1983 through December 1983. Names, ages, performance history, qualifications, date of hire of all transfers into the Computer Groups Department from July 11, 1983 to July 11, 1984.

Facility
Webster, New York

Information Needed

Names, ages, performance history, qualifications, previous positions of all management persons employed in the Maintenance Operations department when reorganized in 12/82, their current positions, Group Division and Unit.

Facility
Webster, New York

Information Needed

Names, ages, performance history, qualifications, engineers who worked in Quality Control Department 1983 and 1984, names, ages, performance history; positions; and qualifications of engineers who transferred into or were hired into dept between 12-83 and 12-84.

Facility
Webster, New York

Information Needed

Names, ages, performance history, date of hire, positions and qualifications of professional employees in the Material Operations and Cost Analysis Group as of 6-1-83; positions of those employees as of 6-1-84. Description of any finance group created to succeed the Cost Analysis Group. Current positions; ages and qualifications performance history of the personnel in the successor group.

Xerox Corporation
Office of General Counsel
P. O. Box 1600
Stamford, Connecticut 06904
203 329-8700

Registered, Return Receipt Requested

RECEIVED
9/23/86
#410

September 22, 1986

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Service
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Dear Mr Finney:

I am responding to your letter to Mr. Philip E. Smith of September 11, 1986. Mr. Smith is retiring from Xerox at the end of this month, and I will be taking over his responsibilities. I believe that it is imperative for us to have a meeting as soon as possible to discuss the EEOC charges against Xerox and your new request for information. It is clear that there are continuing misunderstandings between us on key issues relating to these controversies. My colleagues and I are willing to come to Washington on fairly short notice to meet with you and your staff. Please call me or my secretary (203) 968-3100 to arrange a date.

At the meeting, we would like to clarify our position on the following points:

1. Shortly after receiving the Letter of Violation in April 1984, we indicated our willingness to engage in conciliation discussions with the EEOC. There were several meetings in 1984 which we thought were "substantive conciliation negotiations" and which related to seemingly different people and different time periods than now are of interest to you. The fact is we are unclear as to the current thrust of your investigation and of the subjects about which conciliation is proposed. This needs to be clarified.

2. Since November 1984, we have had a series of discussions about 100 cases of individuals complaining about the circumstances of their leaving Xerox. We have consistently offered to investigate those cases, to provide data to the EEOC about them and, if appropriate, take individual corrective action. We have never received the information that would enable us to take the steps described above. Instead, you have now requested data about hundreds of employees in many different organizations and geographic locations. This request is burdensome and we do not understand where the requested data fits into the EEOC's investigation. While we continue to be willing to investigate the 100 cases of individuals with claims arising after March 31, 1983, and are not at this time refusing to provide the data requested, we must understand what the purpose of doing so is. For example, how does this request relate to (i) the 100 cases, (ii) the April 1984 Letter of Violation, and (iii) your letter of July 14, 1986?

[illegible]

100 cases
post Mar 1983
where no [illegible]

3. In your letter you mentioned your statistical analysis presented at a meeting on September 24, 1985. The meeting was actually on September 12, 1984. There has been no meeting between Xerox and the EEOC since November of 1984.

4. Mr. Smith tells me that during your telephone conversation, he did not agree to the tolling of the statute of limitations and that he would not have the authority to do so.

We remain willing to conciliate and to cooperate with the EEOC's reasonable requests for further data. However, I am sure that you will agree that this can best proceed in circumstances where both parties fully understand the positions of the other. This is not the case now and we ask for a meeting to clarify misunderstandings and agree on how to proceed.

Very truly yours,

Christina E. Clayton

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental
Health & Safety

CEC:mhy

September 30, 1986

Philip E. Smith, Esq.
Assistant General Counsel
Xerox Corporation
P. O. Box 1600
Stamford, CT 06904

In Response Refer To: 86-08-FOIA-241-PA

Dear Mr. Smith:

This office received your Freedom of Information Act request on August 11, 1986. You requested access to the file of Lusardi v. Xerox Corporation, Charge No. 011-82-0888.

Your request is denied at this time because the charge is still being administratively processed by this office. Your request is denied under the seventh exemption of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7)(A). The seventh exemption permits an agency to withhold:

> (7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings.

Thus, investigatory records compiled for law enforcement purposes are exempt from disclosure to the extent that disclosure would interfere with enforcement proceedings. Law enforcement has been held to include civil and administrative proceedings as well as the enforcement of criminal statutes. Center for Personal Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974).

Disclosure of documents gathered during the investigation of an open case would interfere with the Equal Employment Opportunity Commission's enforcement proceedings in that it might produce a chilling effect on the willingness of witnesses to testify or provide information. See NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214 (1978); Southern Coatings Corp. v. EEOC, 27 FEP Cases 701 (E.D. La. 1981). Disclosure at this time may also have a chilling effect on respondent's willingness to meaningfully participate in conciliation efforts.

Your request, therefore, is denied under Section 552(b)(7)(A) of the Freedom of Information Act as disclosure would interfere with enforcement proceedings.

You may renew your request for disclosure after the administrative process has been completed.

You may appeal the denial of your Freedom of Information Act request by writing within thirty (30) days of receipt of this letter to Ms. Allyson K. Duncan, Acting Associate Legal Counsel, Equal Employment Opportunity Commission, 2401 "E" Street, N.W., Washington, D. C. 20507. You must attach this letter to your appeal letter. Your appeal will be governed by the provisions of 29 C.F.R. 1610.11.

Very truly yours,

SPENCER H. LEWIS, JR.
Regional Attorney

Xerox Corporation
P. O. Box 1600
Stamford, Connecticut 06904
203 329-8700

Office of General Counsel

XEROX

October 6, 1986

Leroy T. Jenkins, Jr., Esquire
Assistant General Counsel
U.S. Equal Employment Opportunity Commission
Washington, D. C. 20507

Re: ***EEOC v. Xerox Corporation***
ADEA Investigation

Dear Mr. Jenkins:

In response to your letter to Mr. Philip E. Smith of September 25, 1986, we enclose copies of the relevant portions of the following documents:

1. Form 8-K, Current Report, dated February 23, 1984.
2. Form 8-K, Current Report, dated May 3, 1984.
3. Form 10-Q, Quarterly Report for the quarter ended March 31, 1984.
4. Form 10-Q, Quarterly Report for the quarter ended June 30, 1984.
5. Form 10-Q, Quarterly Report for the quarter ended September 30, 1984.
6. Form 10-K, Annual Report for the fiscal year ended December 31, 1984.
7. Pages 28 and 29 of the 1984 Annual Report to Shareholders (referenced to in item 6).
8. Form 10-Q, Quarterly Report for the quarter ended March 31, 1985.
9. Form 10-Q, Quarterly Report for the quarter ended June 30, 1985.
10. Form 10-Q, Quarterly Report for the quarter ended September 30, 1985.
11. Form 10-K, Annual Report for the fiscal year ended December 31, 1985.

12. Page 34 of the 1985 Annual Report to Shareholders (referred to in item 6).
13. Form 10-Q, Quarterly Report for the quarter ended March 31, 1986.
14. Form 8-K, Current Report dated June 26, 1986.
15. Form 10-Q, Quarterly Report for the quarter ended June 30, 1986.

These constitute the filings made with the Securities and Exchange Commission that Xerox has made pursuant to the Federal securities laws with regard to this matter since the EEOC issued its Letter of Violation in 1984.

Xerox made these disclosures in good faith and on the advice of counsel. Any specific description of Xerox' understanding of its obligations would reveal privileged attorney/client communications.

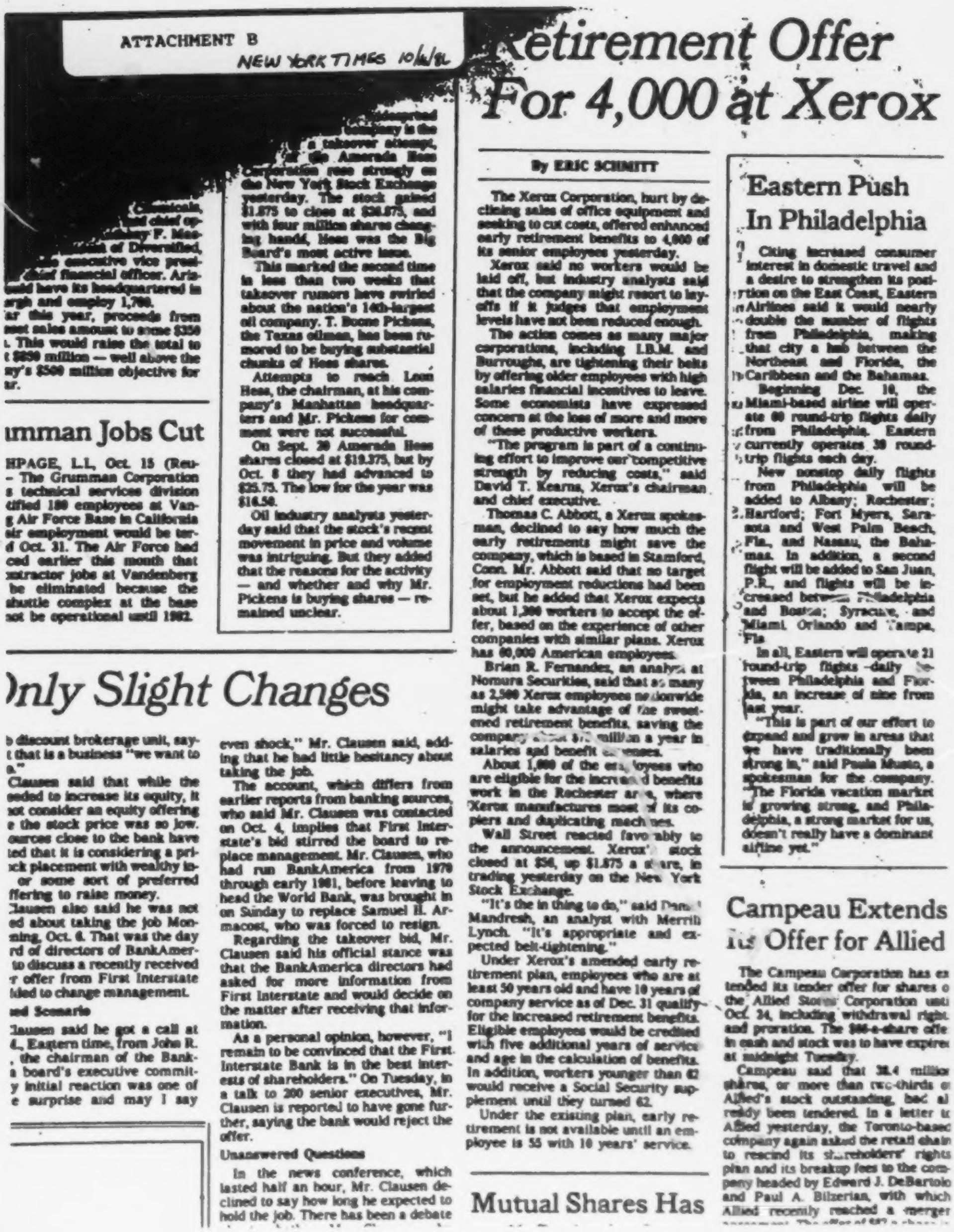
As for the documents you request, there has been no correspondence exchanged by the SEC and Xerox concerning this matter. Internal Xerox documents, if there are any, relating to Xerox' disclosure of the EEOC matter in SEC filings would be covered by the attorney/client privilege.

Very truly yours,

Christina E. Clayton

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental Health & Safety

CEC/htl
Enclosures



ATTACHMENT B

NEW YORK TIMES 10/16/86

(Chemicals,
and chief op-
ey F. Mas-
of Diversified,
executive vice presi-
chief financial officer. Aris-
would have its headquartered in
rgh and employ 1,700.
ar this year, proceeds from
set sales amount to some $350
. This would raise the total to
t $850 million — well above the
ny's $500 million objective for
ar.

company is the
a takeover attempt,
of the Amerada Hess Corporation rose strongly on the New York Stock Exchange yesterday. The stock gained $1.875 to close at $26.875, and with four million shares changing hands, Hess was the Big Board's most active issue.

This marked the second time in less than two weeks that takeover rumors have swirled about the nation's 14th-largest oil company. T. Boone Pickens, the Texas oilman, has been rumored to be buying substantial chunks of Hess shares.

Attempts to reach Leon Hess, the chairman, at his company's Manhattan headquarters and Mr. Pickens for comment were not successful.

On Sept. 29 Amerada Hess shares closed at $19.375, but by Oct. 8 they had advanced to $25.75. The low for the year was $16.50.

Oil industry analysts yesterday said that the stock's recent movement in price and volume was intriguing. But they added that the reasons for the activity — and whether and why Mr. Pickens is buying shares — remained unclear.

ımman Jobs Cut

HPAGE, L.I., Oct. 15 (Reu-
– The Grumman Corporation
s technical services division
tified 180 employees at Van-
g Air Force Base in California
ir employment would be ter-
d Oct. 31. The Air Force had
ced earlier this month that
ntractor jobs at Vandenberg
be eliminated because the
shuttle complex at the base
not be operational until 1992.

)nly Slight Changes

discount brokerage unit, say-
t that is a business "we want to
."
Clausen said that while the
eeded to increase its equity, it
not consider an equity offering
e the stock price was so low.
ources close to the bank have
ted that it is considering a pri-
ck placement with wealthy in-
or some sort of preferred
ffering to raise money.
lausen also said he was not
ed about taking the job Mon-
ning, Oct. 6. That was the day
rd of directors of BankAmer-
to discuss a recently received
r offer from First Interstate
ided to change management.

ed Scenario

lausen said he got a call at
4., Eastern time, from John R.
, the chairman of the Bank-
a board's executive commit-
y initial reaction was one of
e surprise and may I say

even shock," Mr. Clausen said, adding that he had little hesitancy about taking the job.

The account, which differs from earlier reports from banking sources, who said Mr. Clausen was contacted on Oct. 4, implies that First Interstate's bid stirred the board to replace management. Mr. Clausen, who had run BankAmerica from 1970 through early 1981, before leaving to head the World Bank, was brought in on Sunday to replace Samuel H. Armacost, who was forced to resign.

Regarding the takeover bid, Mr. Clausen said his official stance was that the BankAmerica directors had asked for more information from First Interstate and would decide on the matter after receiving that information.

As a personal opinion, however, "I remain to be convinced that the First Interstate Bank is in the best interests of shareholders." On Tuesday, in a talk to 200 senior executives, Mr. Clausen is reported to have gone further, saying the bank would reject the offer.

Unanswered Questions

In the news conference, which lasted half an hour, Mr. Clausen declined to say how long he expected to hold the job. There has been a debate

etirement Offer For 4,000 at Xerox

By ERIC SCHMITT

The Xerox Corporation, hurt by declining sales of office equipment and seeking to cut costs, offered enhanced early retirement benefits to 4,000 of its senior employees yesterday.

Xerox said no workers would be laid off, but industry analysts said that the company might resort to layoffs if it judges that employment levels have not been reduced enough.

The action comes as many major corporations, including I.B.M. and Burroughs, are tightening their belts by offering older employees with high salaries financial incentives to leave. Some economists have expressed concern at the loss of more and more of these productive workers.

"The program is part of a continuing effort to improve our competitive strength by reducing costs," said David T. Kearns, Xerox's chairman and chief executive.

Thomas C. Abbott, a Xerox spokesman, declined to say how much the early retirements might save the company, which is based in Stamford, Conn. Mr. Abbott said that no target for employment reductions had been set, but he added that Xerox expects about 1,300 workers to accept the offer, based on the experience of other companies with similar plans. Xerox has 60,000 American employees.

Brian R. Fernandez, an analyst at Nomura Securities, said that as many as 2,500 Xerox employees nationwide might take advantage of the sweetened retirement benefits, saving the company [illegible] million a year in salaries and benefit expenses.

About 1,000 of the employees who are eligible for the increased benefits work in the Rochester area, where Xerox manufactures most of its copiers and duplicating machines.

Wall Street reacted favorably to the announcement. Xerox's stock closed at $56, up $1.875 a share, in trading yesterday on the New York Stock Exchange.

"It's the in thing to do," said Daniel Mandresh, an analyst with Merrill Lynch. "It's appropriate and expected belt-tightening."

Under Xerox's amended early retirement plan, employees who are at least 50 years old and have 10 years of company service as of Dec. 31 qualify for the increased retirement benefits. Eligible employees would be credited with five additional years of service and age in the calculation of benefits. In addition, workers younger than 62 would receive a Social Security supplement until they turned 62.

Under the existing plan, early retirement is not available until an employee is 55 with 10 years' service.

Mutual Shares Has

Eastern Push In Philadelphia

Citing increased consumer interest in domestic travel and a desire to strengthen its position on the East Coast, Eastern Airlines said it would nearly double the number of flights from Philadelphia, making that city a hub between the Northeast and Florida, the Caribbean and the Bahamas.

Beginning Dec. 10, the Miami-based airline will operate 60 round-trip flights daily from Philadelphia. Eastern currently operates 30 round-trip flights each day.

New nonstop daily flights from Philadelphia will be added to Albany; Rochester; Hartford; Fort Myers, Sarasota and West Palm Beach, Fla., and Nassau, the Bahamas. In addition, a second flight will be added to San Juan, P.R., and flights will be increased between Philadelphia and Boston; Syracuse, and Miami, Orlando and Tampa, Fla.

In all, Eastern will operate 21 round-trip flights daily between Philadelphia and Florida, an increase of nine from last year.

"This is part of our effort to expand and grow in areas that we have traditionally been strong in," said Paula Musto, a spokesman for the company. "The Florida vacation market is growing strong, and Philadelphia, a strong market for us, doesn't really have a dominant airline yet."

Campeau Extends Its Offer for Allied

The Campeau Corporation has extended its tender offer for shares o the Allied Stores Corporation unti Oct. 24, including withdrawal right and proration. The $66-a-share offe in cash and stock was to have expire at midnight Tuesday.

Campeau said that 38.4 millio shares, or more than two-thirds o Allied's stock outstanding, had al ready been tendered. In a letter t Allied yesterday, the Toronto-base company again asked the retail chain to rescind its shareholders' rights plan and its breakup fees to the company headed by Edward J. DeBartolo and Paul A. Bilzerian, with which Allied recently reached a merger

To: JNF
FROM: CLP, JLM

12/19/86

DRAFT

PRESENTATION MEMORANDUM

Direct Suit

I. Introductory Information

A. Parties:

1. Defendant: Xerox Corporation

2. Plaintiff: EEOC, on behalf of a class of 50 former Xerox employees

B. Commission Charges: Pursuant to the procedures set out in §7(b) of the ADEA, the Commission issued a Letter of Violation to Xerox on April 19, 1984. Three prospective plaintiffs in this lawsuit have filed charges of age discrimination.

C. Location of Facilities: Xerox corporate headquarters are in Stamford, Connecticut, while its facilities are located nationwide. Most of the facilities upon which this lawsuit is focused are located in New York state, California, and Texas. The lawsuit would be filed in the District of Connecticut.

D. Size of Work Force: The number of salaried employees in Xerox and its subsidiaries is about 56,000. The Commission's suit would be limited to former salaried employees.

E. Nature of the Proposed Suit: The Commission's proposed complaint alleges that the Xerox Corporation wilfully and deliberately discriminated against former salaried employees aged from 40 to 70 on the basis of their age in terminating them involuntarily and forcing them to retire while younger people were hired or were retained as employees. The suit would be limited to those who were terminated between April 1, 1983 and the date of the filing of the lawsuit. Included in that group are sales workers, engineers, administrators, financial analysts and marketing representatives.

The relief sought by the Commission on behalf of these illegally terminated employees would include reinstatement where appropriate, back pay, adjustment of pension benefits and any necessary adjustment of health or life insurance benefits.

II. Nature of Defendant's Business

The Xerox Corporation is an important nationwide company whose business includes the manufacture, research and sales of computers, reproduction and business information systems, facsimile communications products, office products, and other related activities. Xerox subsidiaries include Ginn Publishing, Western Union, and Versatec Systems. Xerox facilities are nationwide but are concentrated in the northeast, particularly in upper New York state, around Dallas, Texas, and in California. Personnel decisions, systems, and records are centralized in the corporate headquarters in Stamford, Connecticut.

III. Administrative Record

A. Summary Case Processing Chronology

1. Dates Charges Filed: A Letter of Violation was issued April 19, 1984. Individual charges were filed by three persons who are prospecive class members in the lawsuit.
2. Dates of Determinations: no determinations have been made by the Commission on individual charges.

B. Administrative Record--Narrative

1. Direct Investigation by headquarters Systemic Programs was begun on February 7, 1984.
2. Based on its nationwide investigation, the Commission issued a Letter of Violation, on April 19, 1984, that commenced conciliation pursuant to ADEA §7 (b).
3. Conciliation efforts have continued since issuance of the LOV. During the entire investigation and conciliation Xerox has been uncooperative in supplying requested data. Xerox has consistently maintained that its actions were not discriminatory and has declined to consider any broad based settlement and relief.

The Commission has fulfilled the standards to be met in conciliation. We have undertaken an independent investigation of the allegations of discrimination, we have presented Xerox with a summary of the evidence of age discrimination, and we have attempted to achieve voluntary compliance. We have held four formal conciliation meetings in addition to correspondence and telephone conferences. As provided the Act, the statute was tolled for a year while the Commission conciliated.

During concilation Xerox was informed that the terminated employees can seek back pay, of the ways in which it could achieve voluntary compliance, and of the possibility that the Commission would proceed to litigation should conciliation fail. In addition, Xerox has been invited to express its views of the allegations of discrimination and has done so at length.

IV. Scope of Proposed Suit

The proposed suit would be filed on behalf of 48 class members. The suit would involve three Xerox divisions which have been most heavily implicated in the involuntary terminations of older workers. Most of this group of 48 were in professtional positions such as engineer or were sales reps. As noted above, the relief sought for this group includes back pay, reinstatement, and adjustment of retirement benefits.

The geographical scope of the proposed suit is nationwide, although its focus would be in New York, California and Texas. The Xerox headquarters in Connecticut maintains a centralized computerized personnel data system containing records for all employees nationwide. During our investigation we have developed and organized a computerized data base which would be suitable for use during our litigation.

The Commission's investigation has not found direct evidence of age discrimination in promotions or in hiring. Though we have indications that Xerox seldom hires persons over 40, we have no charge by any unsuccessful applicant which alleges age discrimination. Many of those who were terminated allege that there were open jobs to which they could have been transferred rather than be terminated, and the Commission's suit would cover that aspect of an apparent discriminatory practice.

Our investigation has not uncovered any evidence of a pattern of discrimination on the basis of race, national origin, or sex. There have been some charges making those allegations, but upon review the allegations were found to reflect an individual incident or to be insufficient to support a cause determination.

V. Other Related Actions

Lusardi v. Xerox, (D.N.J.) a class action suit alleging company wide age discrimination by Xerox, was filed March 8, 1983. The original plaintiffs in this action were sales representatives who were terminated after long and successful careers with Xerox and who filed charges of discrimination with the EEOC when they learned that they had been replaced by younger new hires. The court has established a cut-off date, so that those eligible to opt-in as plaintiffs are those whose cause of action arose on or before March 31, 1983. By this date, 1300 plaintiffs have opted into this suit which alleges across the board age discrimination against all present and former employees aged 40 to 70.

Preliminary discovery conducted in this suit has supported the allegations made by plaintiffs that Xerox, in order to cut costs, in late 1981 designed and implemented a massive program to get rid of older, higher paid employees and replace them with lower paid new hires. Because the initial burden of showing a prima facie case for 1300 plaintiffs whould be too cumbersome and time consuming, the court has allowed the plaintiffs to select a random sample of 50 plaintiffs as a representative group. Showing a prima facie case for the persons in this sample will allow the plaintiffs to maintain the lawsuit as a class action under §16 (b) of the Fair Labor Standards Act and to expand the discovery beyond the sample group. Although the discovery as to this group of 50 is complete, there has not yet been an evidentiary hearing concerning their individual allegations.

During the initial stages of this suit, Xerox has filed five appeals in the Third Circuit concerning procedural aspects of filing and maintaining such a suit as a class action. Xerox so far has lost each of its arguments in both the district and circuit courts.

VI. PROOF

A. General EEO-1 Profile

The proposed suit would cover only former salaried employees who were aged from 40 to 70 when they were terminated. The following general information regarding the Xerox workforce is of interest. According to the 1986 EEO-1 Report, Xerox employed 68,143 persons, of whom 8175(12%) are black, 3746 (5.5%)

are Hispanic, and 26,438 (38.8%) are women. The same statistics for the combined categories of officials and managers, professionals, and sales workers are as follows: Total 29,000; black: 2652 (9.1%0; Hispanic: 867 (3%); women: 8427 (29%).

B. Proof of Issues for Suit

Evidence concerning possible age discrimination by Xerox has been gathered from many sources including interviews with charging parties, potential plaintiffs, and plaintiffs in the Lusardi lawsuit; statistical analyses prepared by an outside expert, information submitted by Xerox, and information obtained during discovery in the private lawsuit.

Although we have narrowed our focus to the time period after April 1, 1983, the employment policies of Xerox and the specific circumstances of the terminations of our group of prospective plaintiffs can only be examined within the context of the actions of Xerox taken between 1980 and March 31, 1983. Consequently, some of the evidence discussed is from this earlier period. It is clear that this evidence is directly related to the discrimination which continued throughout the period at issue here.

Evidence of Companywide Pattern of Age Discrimination

The issues in this proposed lawsuit arose when the Xerox Corporation, in response to financial pressures, undertook extensive restructuring and organizational changes in order to become more competitive in the high technology industry. The evidence obtained by the Commission shows that Xerox embarked on a conscious and deliberate program which violates the ADEA by eliminating older, higher paid employees and by replacing them with younger new hires. The company not only saved money in salaries but also was able to reduce its short term prospective costs in that the new hires, in contrast to the employees who were forced to leave, were far away from eligibility for any retirement benefits.

This program was most intense in 1981 and 1982. The filing of the Lusardi lawsuit in March, 1983 corresponds with a sudden drop in the number of forced early retirements, but the terminations of older workers continued through 1983 and into 1984. It now appears that Xerox is reactivating this effort to eliminate older workers. On October 16, 1986 Xerox announced that it plans to reduce its professional workforce by offering early retirement benefits to 4000 of its senior employees. The newspaper account quotes Xerox officials as stating that lay-offs will be necessary if too few older workers take advantage of this offer.

Throughout our investigation and conciliation, Xerox has maintained that a massive reduction in its workforce was necessary to reduce costs and that this reduction was accomplished by voluntary terminations and through the use of objective criteria for the infrequent involuntary terminations.

Our evidence shows that from 1980 through 1983, Xerox actually hired many more employees than the number who left. 1/ Rather than reducing the number of employees, Xerox was replacing the older, highly paid professionals with new hires who make less money. Several sources who were high level Xerox officials have outlined independently a pattern of directives issued to midlevel managers at meetings that that they must get rid of the "old-timers" and that they must "counsel out" these employees. There is much evidence, both anecdotal and documentary, that older workers were targeted for elimination from the Xerox workforce. Voluntary reductions in force with an offer of severance benefits were always followed by an involuntary RIF. Older workers were "counselled" that failure to take the "voluntary" offer would result in termination with no benefits.

The evidence which outlines a deliberate corporate policy of getting rid of its older workers dates from 1982 and 1983. We fully expect that during discovery we can obtain similar evidence regarding the post 1983 time period.

Because the official company policy concerning reductions in force is to choose those for termination on the basis of performance evaluation and tenure with Xerox, absent age discrimination we would expect that the majority of terminees would be newer, younger employees.

Instead, we have found that not only were most terminees over 40 but that the number of terminees over 40 was consistently disproportionately large compared to the ages of the Xerox workforce.

1/ Our computerized personnel records have a cut-off date of December 31, 1983 which was immediately prior to our first request for information. Requests to Xerox to furnish an update on these records or to supply data regarding individuals whom we have identified have been refused.

Analysis of computer records from 1980 through 1983 shows that during the period Xerox RIFed 2598 salaried personnel 2/ who were aged 40 or more at termination, while 22, 768 persons under 40 were hired for the same job categories. In 1983, the specific period on which our proposed lawsuit focuses, 559 persons were RIFed, of whom 65.5% were over 40. During the same year, there were 5711 new hires, only 6.7% of whom were over 40. During this year when 65.5% of the RIFs were of persons over 40, only 36.% of the Xerox salaried workforce was 40 or more.

The major job categories affected by the RIFs were engineering, sales and sales management, support services, editorial and publishing positions, technical and customer service, scientific and research positions. There were 47 RIFs in Engineering in 1983, whial at the same time there were 325 new hires. The average age of the new hires was 28.5, while the average age of those RIFed was 46.2. During that year, there were also 21 RIFs in Sales and Sales Management, while there were 1441 hires in this category.

While the statistical analysis shows a marked pattern of disproportionate impact on employees over 40, the factual question which remains is whether those person categorized the company as voluntary RIFs were truly voluntary. Xerox has, in its presentations to us and in defense of the private lawsuit, omitted so called "voluntary RIFs" as it asserts that those who left in this category could not have been discriminated against since leaving Xerox was their choice. While undoubtedly some who left were truly voluntary, the amount and nature of evidence that many who were termed as voluntary RIFs by Xerox only left to avoid termination with no severance benefits has led us to regard all RIFs as part of one category. Repeated requests to Xerox to furnish us the names of the persons it calls voluntary RIFs, so that we might verify Xerox's assertion, have been refused.

Victim Identification

Persons in the prospective plaintiff group were terminated during the period from April 1, 1983 to July 30, 1984. All but

---

2/ We have used Total RIFS which are the combined voluntary and involuntary RIFs. The reason for using this total is discussed in the following pages.

15 of the group were terminated in 1983. Most of the group members worked for the Reprographic Business Group in Webster, New York, in which massive RIFs took place in late 1982 and early 1983. These RIFs continued at a slower rate throughout 1983.

These 48 individuals have been identified through several means, including contacts with the private plaintiffs and charges of discrimination filed with the Commission. Although we have extensive computerized personnel records, Xerox has consistently refused to furnish names of its employees or former employees. There is no practical way to identify individuals who have not come forward on their own. It is expected that during discovery additional individuals who allege discrimination on the basis of age will be identified.

The group for whom we have sought relief during conciliation and who would be plaintiffs in our proposed lawsuit includes former engineers, managers, sales persons and clerical workers. Most of these former employees allege that they were forced to resign or retire when they were given the choice of taking a "voluntary" RIF program or being involuntarily RIFed with no severance benefits. The group also includes several who were terminated involuntarily when divisions or plants closed or functions were moved elsewhere; in addition, there are 4 former employees of the U.S. Insurance Group, a Xerox subsidiary, who were fired with the allegation that their performance was inadequate.

Anecdotal Evidence

Typical of the allegations of age discrimination from the Reprographic Business Group in Webster, New York is the story of a former business analyst. This former employee, who worked in the accounting division of the RBG, was at 53 the oldest professional employee of 15 in his unit. After the announcement that the unit had to be reduced by three professional employees, his manager told him that he was vulnerable to the involuntary RIF which was coming and that his only chance to get severance benefits was to take the early retirement program being offered. This employee had organized the unit several years before and had consistently received above average performance evaluations. There was no allegation that his performance was deficient in any way; rather, his manager told the employee that instructions had been given that he, the manager, was to get the employee to leave. Although this employee had the longest tenure in his department he was the only one in the unit to leave the company. The only two others in the department who were over 50 also had to leave the accounting unit, but they transferred to other departments. They left during a subsequent RIF. The 53 year old business analyst was replaced by a person in his early forties. Another open position to which the RIFed employee tried to transfer was filled by a man in his thirties. By taking the early retirement, this employee has had his retirement benefits cut by about two thirds of what it would have been had he worked until 65, when he planned to retire. He was out of work for 2 years and the job he was able to get pays $12,000 less than his job at Xerox.

Xerox highlights the fact that many of the terminated employees were given the bridge to retirement option at termination. This option allowed an employee over 52 1/2 years old to receive up to 15 months severance pay spread over 30 months until they were eligible for retirement at 55 years old. However, all of the employees we have contacted who took the bridge to retirement option did so involuntarily.

The following 53 year old terminated account executive is typical of the employees who took the option. He had worked for Xerox in its New York sales office for 20 years. For 18 of those years he had been a member of the President's Club (composed of employees who exceed their sales goals for the year). His last three performance ratings were 4's and 5's in a 5 point rating system. Nothing in this employee's record indicates that he was not a consistently good performer. He states categorically that he did not want to retire when he was asked to do so by his supervisor. However, he saw how "old timers" in his division were being assigned to unfamiliar and inferior territories in which they were unable to achieve their sales quotas. He felt that he had no alternative but to take the "voluntary" bridge to retirement option. He had planned to work until he was 65. As a result of his forced early retirement his life insurance was reduced from a $300,000 policy to $5,000, he had his medical benefits reduced, his social security benefits will be reduced and his benefit plan from Xerox, which was based on age 65 retirement is much less than it would have been had he been allowed to continue working there. Although he is again working for another company, he has had to take a $27,000 pay cut.

The facts belie the Xerox assertion that those it terms as voluntary RIFs chose to leave because some better alternative was open to them. Many of those in the group of prospective plaintiffs remain unemployed or have taken jobs which pay much less than they made at Xerox. Several have lost their houses, moved across the country to find work, and have been unable to continue to send their children to college. It is clear that the current economic circumstances of the prospective plaintiffs could hardly have been chosen voluntarily.

VII. CONCLUSION

During our investigation of allegations of age discrimination at Xerox, we have developed our data base with a view toward litigation. We anticipate that updating this data base, hiring an expert to analyze and to draw conclusions from this data would not involve great expense. It is also anticipated that we would be able to use the data obtained by the private plaintiffs in the Lusardi lawsuit and that this information would be helpful to our case as well.

As the agency charged with enforcement of the ADEA, the Commission has an obligation to be involved in important cases to the extent that it can help shape the development of case law and can insure that victims of illegal age discrimination are afforded appropriate relief. Although the number of persons in the prospective class is small here, the issue of forcing older workers out in order to save money is an important one with wide social implications. In addition, the issue in regard to actions by Xerox, is one of high visibility. If the EEOC is to vigorously enforce the ADEA, it cannot passively allow such apparently blatant illegal acts to continue. Based on the evidence of deliberate age discrimination by Xerox and its failure to conciliate, we recommend that the Commission approve the filing of the attached complaint.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

DEC 10 1986

CERTIFIED
RETURN RECEIPT
REQUESTED

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental
Health & Safety
Xerox Corporation
Office of General Counsel
P.O. Box 1600
Stamford, Connecticut 06904

Dear Ms. Clayton:

I am in receipt of your correspondence regarding the charge issued by the Commission under the Age Act. Our attempts to reach you by telephone have been unsuccessful.

My conversations with your predecessor, Mr. Smith and the subsequent letter from me to him, dated September 11, 1986, outlined data which would facilitate any serious settlement discussion. In those conversations, I stressed to Mr. Smith that time is becoming a factor. The charge is several years old, and some members of the class stand in jeapardy of losing their claims if the running of the statute is not tolled. These points were reiterated in the correspondence, and you might care to review it.

I have heard the Company's position regarding the time frame of the charge, through Mr. Smith. Nothing on the face of the charge, or in any communication of which I am aware indicate or suggested, that the focus would be limited to the time frame suggested by representatives of the Company.

If you, nevertheless, believe that there is something further to clarify, we, or members of our respective staffs, can meet as you suggest. Since the statute is not tolled, the meeting should take place at the earliest. For purposes of facilitation, an agenda should be set beforehand.

I will have a member of the staff contact you for that purpose within a few days.

Sincerely,

James N. Finney
Associate General Counsel

January 14, 1987

MEMO TO FILE

SUBJECT: CONCILIATION MEETING WITH XEROX, 1-14-87

In attendance:

XEROX- Richard Paul,
Phil Smith, former Assoc. GC
Christina Clayton, Asst. GC

EEOC- Jim Finney
Leroy Jenkins
Jim Scanlan
Carlton Preston
Judy Mathis
Catherine Vaughn

Scope of our LOV/Time Period of our Focus

The first topic of the meeting, as introduced by Mr. Finney, was the scope of our Letter of Violation. Xerox repeated its recent assertions that our focus on persons terminated after March 31, 1983 is new and is contrary to what we told them in the past. Much discussion followed about Xerox's stated reasons for believing we had confined our investigation and any possible relief to the pre-March 31, 1983 period. We recited several instances when we had specifically declined to limit our focus and when we had let Xerox know we were definitely looking at the persons allegedly discriminated against after the time when they would have been eligible to opt into the Lusardi lawsuit. When asked to relate any time when we had stated that we are limiting our investigation to pre-March 1983, Mr. Paul agreed that we had never specifically stated that.

This discussion about the time upon which we are focusing seemed to resolve the dispute about what we told them and what they had been led to believe. (I would expect Xerox to reiterate its argument if we file suit and it responds with a general attack on our good faith in concilating) We made the point that the proposed conciliation agreement sent in July 1986 focused on this post-Lusardi group for settlement purposes but that any litigation we undertake would probably encompass a much larger group representing a wider period of time, possibly back to 1980.

One point about this time period was of interest in relation to the facts of our case. Ms. Clayton stated that if we are talking about the time after mid-1983, then "that was a whole new world at Xerox" because the man-power reductions were complete by then. They later argued a rather contradictory position in saying that there were thousands of people who could be affected by a general tolling of the statute. This statement was in the context of discussion about those terminated in 1983 whose rights will soon expire.

Individual or Pattern and Practice Focus

One of the major questions Xerox had today is whether our objective is to make a settlement concerning the rights of the 100 people we have discussed or whether we seek to vindicate the rights of a broader class. They wanted to know whether providing the information requested would mean that our focus would now be confined to these individuals. Leroy pointed out that we consider this case to be one of pattern and practice age discrimination rather than a series of individual events about which people have complained. We stated that the events in which these people may have been involved are, in our view, examples of widespread practices. We made the point several times that we will continue to look at the pattern of age discrimination which took place across time and throughout the company. We stated that although these individuals have come to our attention, we do not confine ourselves to a consideration of their individual allegations.

There was much discussion about who said what to whom regarding the possible trade of the names, of the 100 persons we have identified, for specific comparative information about their alleged discrimination. Smith remembers hearing about these 100 persons in November, 1984 and discussing a trade. He stated that he believed the names were forthcoming in January, 1985 and that we had agreed to give Xerox the names after which it would respond with some information. Our collective recollection is that we agreed to provide a narrow and specific request for information about each person but that our providing names was tied to some commitment by Xerox to settle the overall charge or to toll the statute.

In discussing our information request that has been outstanding since September, 1986, Ms. Clayton characterized it as burdensome and went into some detail about the difficulties in gathering such specific information from many different facilities. (Previously Xerox has argued that we have only asked for company-wide data so how can we know any specifics and how can they respond to our allegations if they cannot point to particular people or facilities) She stated that Xerox needs the names of the persons so that it can investigate the situation and reconstruct the events. With the names, Xerox could "test for relevancy" and without the names, she says, "Xerox is working in a vacuum." She said that if we give Xerox the names of the people, it will investigate the allegations of discrimination, give us the personnel file and, to "the extent Xerox deems appropriate" it will give us the data we request. Later she agreed to use Rule 26, F.R.C.P., as the standard by which Xerox would decide what information it would make available to the EEOC.

We explained in some detail why an independent investigation by the EEOC cannot be carried out in such a context and why we are unwilling to let Xerox make the determination of what information to give us in relation to a particular person. Later we agreed in principle that using the Rule 26 standard is reasonable.

Discriminatory Practices Identified

Ms. Clayton made repeated assertions that the EEOC has never told Xerox what discriminatory practices it is alleged to have carried out. These statements, also made by Mr. Paul and Mr. Smith, seemed to be directed toward a future argument that EEOC has not fulfilled its obligation, under the ADEA, to notify the company of its discriminatory practices and to give the company a chance to respond. Ms. Clayton said that they have never been given the opportunity to give their position and that "we've never gotten to respond to Johnny Jones' allegations."

We set out our recollections regarding this issue. We pointed out that we had explained to Xerox at some length during the September, 1984 meeting how our evidence shows it has discriminated against its older workers. In addition, we gave examples of other meetings during which we discussed the Xerox practice of coercing employees to take a "voluntary" termination. At the end of the meeting, Mr. Finney said that we would pull together further examples of our notices to Xerox and would include them in our next letter.

Positions on the Ultimate Questions

Mr. Finney put on the table our offer that we are willing to give Xerox the names of the persons we have identified in return for:

1. the commitment by Xerox to provide the data requested;
2. the commitment by Xerox to a schedule for production of the data; and
3. a written agreement by Xerox to toll the statute of limitations while we continue our conciliation.

The Xerox response to this offer was that the top management, or CEO, has made the decision that Xerox will not agree to a general tolling of the statute. Mr. Paul agreed to talk to David Kearns again about our request for a general tolling and said he would send us a letter next Monday as Mr. Kearns is away until then. On the question of a tolling which would be specific as to the 100 people we would name, they agreed to consider that along with their management and call us tommorow with an answer.

Mr. Paul stated that the Xerox view of the statute of limitations is that it exists for a good reason and that "we have already had tolling for a year based on the Letter of Violation." He continued that they believe there has been ample time so there is no need for further tolling.

We explained that we cannot let this conciliation drag on past the time when the lawsuits by aggrieved persons would be untimely. We made the point that tolling the statute is a further attempt to foster settlement by allowing us to continue to work on resolution in an administrative context. We outlined the procedure we follow in our next step, which is to recommend litigation to the Commission. Mr. Paul agreed that this is the decision we have to make.

In setting out the Xerox position as to conciliation, he stated that they are "unwilling to conciliate as a classwide issue any of the VRIF programs." He said that after looking at the VRIF programs for the defense of the private lawsuit, they are convinced that their VRIF programs were good. They are willing to address individual cases of people who think they were treated unfairly in some VRIF program. He allowed that he does not doubt that some individual managers may have incorrectly implemented the programs. According to Paul, Xerox is willing to conciliate: (1) practices other than those associated with VRIF programs; (2) IRIFS; and (3) individuals who may have left in a VRIF.

In discussing a scenario that assumed Xerox and EEOC had reached agreement on the issue of tolling, both Paul and Clayton agreed Xerox would supply information after it had been provided the names. They said they would provide the information "expeditiously" which later they defined as 3 months to completion. They said they would provide a "rolling" response, submitting the information as they receive it. Both Clayton and Paul agreed with Smith's statement that they had always assumed that after they provided initial information a process would follow in which we would ask questions and Xerox would respond with additional or clarifying data. We agreed with Xerox that the 3 month period would begin when we provided the names of individuals.

Commitments

Ms. Clayton is to call Mr. Finney tomorrow regarding tolling the statute for 100 individuals. Next Monday they are to write us a letter regarding general tolling after Mr. Paul talks to David Kearns. The Xerox letter to us is also to describe their understanding of the further conciliation process we discussed today.

We said we would also write a letter, although we did not specify when. (After the meeting, Mr. Finney directed that this letter be a response to the Xerox letter) We commited to pulling together the instances when we have discussed with Xerox its alleged discriminatory practices. In addition we stated that our letter would set out our understanding of the points discussed in today's meeting.

XEROX

Stamford, Connecticut 06904
203 329-8700

Office of General Counsel

BY HAND

January 20, 1987

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Service
U.S. Equal Employment Opportunity Commission
Washington, D. C. 20507

Dear Mr. Finney:

This is to confirm the tentative agreement that we reached last Wednesday on a procedure for further conciliation and also to report to you Xerox' position regarding the tolling of the statute of limitations.

We agreed that the EEOC would begin the process by submitting to Xerox the names of the 100 individuals who have complained about the circumstances of their terminations. Although we did not discuss it at the meeting, it would be helpful if the EEOC would also supply a statement of their particular claims. Xerox would then investigate each one of these cases and provide the EEOC with the information requested in the attachment to your letter of September 11, 1986 if the information is relevant to the cases and otherwise unobjectionable under the principles set forth in Rule 26 of the Federal Rules of Civil Procedure. Xerox also would provide the EEOC with its position on each of these cases and, as we have stated many times, offer to compensate any of these individuals whom we find to be the victims of age discrimination. Xerox' submission would be on a rolling basis and would be complete within three months of our receipt of the list of names.

Xerox management has accepted our recommendation to toll the statute of limitations on the claims of the 100 named individuals. The tolling would commence upon Xerox' receipt of the names and would continue for six months. Needless to say, the tolling would not revive claims that turn out to be time-barred as of the tolling commencement date. Xerox management will not agree to toll the statute for an action on behalf of unnamed employees or a class.

As we stated at the meeting, Xerox continues to believe that it has not engaged in any systemic violation of the ADEA. The EEOC agreed to identify for Xerox the alleged practices that it considers discriminatory on the basis of age.

We look forward to your response.

Very truly yours,

Christina E. Clayton

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental Health & Safety

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 5, 1987

Christina E. Clayton, Esquire
Assistant General Counsel
Personnel and Environmental Health
& Safety
Xerox Corporation
P.O. Box 1600
Stamford, Connecticut 06904

Re: EEOC v. Xerox Corporation

Dear Ms. Clayton:

We have received your letter of January 20, 1987. You feel we had reached a tentative agreement at our meeting on January 14, 1987. It is the Commission's understanding, based upon your letter, that Xerox will agree only to a tolling of the statute with regard to the individuals who have complained to the Commission and whose claims are being represented by us for purposes of conciliation. In return for this agreement, Xerox would, as soon as practical, but within three months, submit to the Commission the information that we requested in our letter of September 11, 1986, provided that the information requested is deemed by Xerox to be relevant, and such information is allowable under Rule 26 of the Federal Rules of Civil Procedure (F.R.C.P.).

With regard to the meeting which was held on January 14th, it was not our understanding that any tentative agreement had been reached. It was our understanding that you and the other Xerox representatives would return to Stamford and inquire from higher management whether it would be willing to agree to a general tolling of the Statute while conciliation efforts continued. If Xerox was willing to agree to that contingency, the Commission would provide the names of approximately 100 former Xerox employees. Xerox would, on a "rolling" basis, (to be completed within 3 months) provide the Commission with the information requested in our September 11, 1986 letter, provided the information requested was allowable under Rule 26, F.R.C.P. Upon receipt of this information, and any other position statement or information provided by Xerox, the Commission would analyze each claim and facilitate further discussions with Xerox on those claims and on the various practices which the Commission believes violate the Age Discrimination in Employment Act (ADEA).

Your letter makes it clear that there were different understandings reached at the January 14th meeting. You, also, appear to have clarified your position at that meeting by insisting upon unilateral determination by Xerox of whether information requested by the Commission is relevant. It was specifically asked at the meeting whether the scope of your determination to send the information requested was limited to the parameters of Rule 26, F.R.C.P. The response to the question was "yes."

This supplementation and Xerox's refusal to agree to a general tolling illustrate why it appears that further conciliation efforts will be futile. At this point, we believe it will be helpful to capture in this one letter the Commission's view and position on the processing of this charge to date.

On February 7, 1984, the Commission issued a letter commencing a directed investigation into possible ADEA violations. This investigation was triggered by a large number of charges that had been filed with the Commission around the country by individuals claiming to be adversely affected. Those alleged violations revolved around Xerox's series of programs designed to reduce through voluntary and involuntary means its labor force (RIFs).

The Commission conducted its investigation recognizing that the Statute of Limitations was running on all individual claims. To conduct its investigation, the Commission had included a detailed request for information in its February 7th letter. The Commission received some non-statistical general information on charging parties and policies in March, 1984. Xerox did not provide the crucial statistical and computerized data requested by the Commission at that time. Xerox complained about the volume of that information and specified that it would take a minimum of 26 weeks to provide that information to the Commission.

When some of that information was produced by Xerox in July of 1984, it was critically incomplete. Despite assurances by Phil Smith and others from Xerox that it contained all of the codes necessary to analyze the information, family job codes were missing. Lower level Xerox personnel verbally confirmed that they knew that all of the information (including the family job codes) was not produced. It was not until September, 1984, that Xerox supplied readable computer records.

During the time the Commission was experiencing the frustration of ascertaining the completeness of the information provided by Xerox, and trying to analyze that information, it also interviewed the charging parties and a large number of other former Xerox personnel, including an individual who assisted in the designing of the reduction in force plans. Their collective testimony indicated that the RIFs were implemented in an overwhelmingly involuntary fashion, and were designed to hit older workers the hardest. The Commission obtained copies of memoranda, one of which was presented to Xerox, which indicated that the programs were aimed at replacing longer tenured, higher paid employees of Xerox with lower cost new hires.

The Commission analyzed all of the information that Xerox had provided pursuant to the Commission's initial request for information. Our analysis revealed a disproportionate impact on protected age group members, both with regard to voluntary and involuntary terminations.

The above specified information from witnesses and Xerox, the failure of Xerox to provide all of the information specifically requested by the Commission (particularly the Commission request for the names, addresses and telephone numbers of all former Xerox employees who "voluntarily" resigned from Xerox during the period of time covered by the Commission's request), the receipt of misinformation concerning the completeness of the information presented by Xerox, along with the quickly passing statute of limitations, led to the issuance by the Commission of a Letter of Violation on April 19, 1984.

Xerox should note, and this point is important, the level of proof in an investigation is "reasonable cause" to believe that discrimination exists. This burden is an administrative one and is a significantly lesser burden than that imposed by a trial court. This burden was satisfied by weighing all aspects of the investigation that was completed within the time frames with which the Commission must comply to avoid sacrificing any potential claimant's rights. Xerox's own actions, inactions and delays contributed to our findings.

Further, the Commission wants Xerox to be abundantly clear on what was found. The Commission has found that Xerox engaged in a series of programs which violated the ADEA by involuntarily (or with the use of undue influence) operated to disproportionately terminate employees over the age of forty, and most particularly those over the age of fifty. These programs are diverse. The Commission does not know all of these programs because of the restrictions imposed by Xerox on what information it would release to the Commission. However, the Commission has reasonable cause to believe that there are several such programs. These programs have discriminated in their aim and in their implementation.

We continue to regard the issues here to be those of a pattern and practice of age discrimination, rather than a series of individual events. We regard the complaints of individuals who have come to our attention to be examples of policies and widespread practices that originated at Xerox Headquarters and were implemented in local facilities nationwide.

The Commission has not placed any artificial limitation on the time period during which Xerox has engaged in these practices. Any supposed limitation has been created by Xerox. It is without foundation, and not the result of anything the Commission has proffered.

We feel that we have made ample attempts to conciliate our findings. We held several meetings with Xerox in 1984, during which Xerox was permitted to present its position and view of its RIF programs. We listened, considered what was presented, but heard nothing that would justify altering our findings. Specifically, the Company's presentation on September 12, 1984 was overly simplistic and drawn against only two broad categories of age groups. The presentation solidified our finding that there were programs (eg., the bridge to retirement program) which were clearly, by definition, aimed at older workers, and which were implemented in a discriminatory fashion. Xerox's position concerning the "voluntariness" of the programs was in direct contradiction to hundreds of interviews of former employees. Moreover, Xerox's refusal to provide the Commission with the names of "voluntary RIFs" lent further incredibility to Xerox's position. We firmly believe that a good many, if not most of these "voluntary" terminations were not voluntary, but were involuntary.

We held additional meetings, and telephone conversations with representatives from Xerox. In a last effort to resolve this matter, the Commission offered to provide the names of potential victims, in exchange for certain information pertaining to them and similarly situated individuals and a general tolling of the Statute. This has been rejected by Xerox. Xerox has said it refuses to conciliate on the "voluntary RIF program." Moreover, Xerox continues to insist that there is no issue of pattern and practice discrimination, but merely, perhaps, isolated instances.

In a nutshell, for conciliation purposes only, the Commission insists upon Xerox making offers of reinstatement to the persons for which the Commission is willing to provide names who were adversely affected by Xerox's policies, making back pay arrangements to these individuals, adjusting pension and other benefits, and eradicating all policies and practices which operate to involuntarily terminate protected age group workers. We would also insist upon a general tolling of the statute of limitations for all victims since March 31, 1983. We, again, offer these parameters to Xerox. If within five (5) days of the receipt of this letter, Xerox has not accepted these general terms, we have no alternative but to deem conciliation to have failed pursuant to Section 7(b) of the ADEA, and Systemic Litigation Services will seek authority from the Commissioners to file suit.

Sincerely,

James N. Finney

James N. Finney
Associate General Counsel
Systemic Litigation Services

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FEB 1 8 1987

MEMORANDUM

TO: Leroy T. Jenkins, Jr.
Assistant General Counsel

FROM: James N. Finney
Associate General Counsel

SUBJECT: Xerox Presentation (litigation recommendation)

The following are some of the questions we can expect to encounter in presenting the litigation recommendation in the Xerox matter. The general premise is that the employer was faced with a need to adjust the size of the workforce downward. This may have resulted in the elimination of certain jobs, or the merging of elements of certain jobs to produce jobs with different substantive context.

1. The relevant years under focus?
2. The size of the workforce at the beginning of the process, and the size of the workforce currently. How many facilities are there? How many were involved?
3. Pinpoint, if we can, where jobs were lost; and where they re-emerged. Also state, to the extent that we know, whether the re-emerged jobs were/are substantially different, or, for the most part, essentially the same jobs but with different titles.
4. The number of individuals who are complaining of age discrimination. Include and identify the numbers of such individuals in the private lawsuit, as well as the number who are being represented by the Commission.
5. The number and percentage who were "voluntary", and those who were "involuntary". PAC – Breakdown v. Under 40.
6. Capsulate the expert's opinion and have a copy of his report ready to be submitted if asked for.
7. A clear and concise statement of our theory of violation, and Xerox's theory of defense.
8. We will need to describe the nature and content of the offer to elect "voluntary" retirement--and "involuntary" retirement. There is a notion that this former was very attractive. We have maintained that there was more than an element of "arm twisting" in this process. We need to describe what that was, and how it worked. It is my impression that the most persuasive case we can expect

to be able to make, if at all, should involve repeated situations where--after the offers and elections were made and taken, jobs which were said to be slated for elimination, in fact, continued, or reappeared, with non-protected age group personnel--and in roughly the same general geographic location.

The above are some of the points covered in our meeting. I may think of others before we are ready to present this to the Commission. This is also in addition to those other issues which you were going to handle.

DRAFT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 25, 1987

MEMORANDUM

TO : Johnny Butler
General Counsel (Acting)

FROM : James N. Finney
Associate General Counsel

SUBJECT : *EEOC* v. *Xerox*

This memorandum is in response to your request for information relating to our proposed litigation against the Xerox Corporation for violations of the ADEA. Following is a discussion of the evidence we have obtained and analyzed, along with a chronology of our investigation and conciliation. Attached to this memorandum are letters between the EEOC and Xerox which reflect each party's position.

The Commission's letter of February 5, 1987 contains a summary of our findings, as well as a review of our repeated efforts to achieve a successful resolution of this case. As our letter points out, we regard the issues here to be those of a pattern and practice of discrimination rather than a series of individual events. Our evidence shows that Xerox developed and implemented a series of programs which violated the ADEA by forcing older workers to leave the company. These programs have discriminated both in their intent and in their imlplementation.

The position outlined in this letter is consistent with our past offers and representations to Xerox regarding the issues in dispute. Throughout our investigation and conciliation, Xerox's actions and assertions have not been in keeping with a sincere or good faith effort to resolve its violations of the ADEA. Contrary to its protestations, Xerox has not been cooperative in supplying requested information and, in fact, misrepresented what computer data it furnished for a period of six months. Xerox has consistently refused to discuss its voluntary RIF programs beyond its statement that employees freely chose to take the offer to leave.

Further conciliation would be unproductive and potentially harmful to those injured by Xerox policies and practices. Because we have given Xerox every opportunity to settle this case in the administrative stage, the time limit for many of the potential plaintiffs has become a real consideration in our future actions. We have received more than thirty Congressional inquiries in the past few months regarding our progress in this case. Further delay could irreparably harm the rights of these aggrieved persons.

As early as September, 1984 we were making the same summary points to Xerox as reflected in our last letter. In that meeting, during which presentations were made by experts from both sides,1/ we showed compelling evidence of a pattern of deliberate age discrimination undertaken by Xerox. Our evidence, consisting of statistical analyses, testimony from former Xerox officials, copies of memos circulated at the highest levels of Xerox management, has never been rebutted by Xerox.

1/ Xerox's expert, Dr. James Medoff, did not perform any analysis on VRIFs at the instruction of Xerox. He also later admitted, during his deposition in the *Lusardi* v. *Xerox* suit, that the analyses in his report for us and in the report submitted in *Lusardi* were performed by Xerox employees although he made the presentation. Both analyses were performed on the same data.

Our expert's analysis of the computerized employment data showed a dramatic pattern of terminations among employees aged 50 to 54. This pattern was at odds with the stated Xerox policies to protect the longer tenured workers. In addition, we presented documents and testimony. For example, we produced a memo circulated among top officials which outlined a strategy for saving the company money by "replacing older workers with low cost new hires." We recited the testimony of a former personnel manager of a major Xerox division who states that top level managers were giving specific instructions to get rid of older workers by "counselling and coaching" them to take the VRIF offer or they would be terminated with no severance during the next IRIF. We sought explanation for the fact that Xerox had hired many more people than were RIFFd and for the fact that new employees were being sought and hired for the very jobs held by terminated older workers.

Subsequent analyses and information has confirmed and added to the evidence that Xerox was engaged in illegal age discrimination. Our expert, hampered by Xerox's witholding of the proper documentation to read its computer data until a few days before our meeting, could not perform a leisurely and in-depth analysis. His later report, performed for the plaintiffs in Lusardi v. Xerox, augments his earlier work for us. He found that if the RIFs from the Xerox workforce had been made without regard to age, we would expect to see an outcome like that shown on the Xerox tapes less than once in a trillion times. In 1983 employees over 40 were 36% of the workforce during the period at issue, while they accounted for 55% of the IRIFs and for 77% of the VRIFs.

In addition, we later found that the Xerox IRIF analysis, which purported to show no difference by age, had been misrepresented in that new college hires have been exempted from consideration for IRIF for two years after hire and were therefore not counted in the analysis. We have recently gotten a memo from that time period in which Mr. Smith, Associate General Counsel, instructed all personnel managers to make counts of RIFs and remainaing employees in a way most advantageous to the company. At the top of the memo is the statement, "figures don't lie, but . . ."

Our original investigation was begun when it came to our attention that many age charges had been filed against Xerox which alleged a deliberate attempt by the company to eliminated its older employees to save money. We also became aware of the Lusardi v. Xerox lawsuit, filed in New Jersey in 1983, which 1350 plaintiffs eventually joined. As we interviewed charging parties who had worked in many different facilities across the country and who had held different jobs, their stories were very much alike. A pattern quickly emerged: a Xerox division would announce that because it needed to reduce personnel costs it was offering a VRIF program. This VRIF was followed by an involuntary RIF. During the VRIF employees who were "vulnerable" were told that if they did not take the VRIF they would probably be terminated during the coming IRIF with no severance benefits. They all told of statements by managers that they had been instructed to "counsel and coach" their older employees to leave or of friends who had declined to take a VRIF only to be terminated in the following IRIF.

The only Xerox response to these hundreds of similar statements is that the VRIFs were voluntary. Our investigation has found that potential plaintiffs have frequently suffered financial hardship that could hardly have been voluntary. Many have had their retirement benefits cut by 2/3 while they are job hunting at 50 years of age.

A defense of economic necessity is not available to employers to justify terminating their older workers. "A differentiation based on the average cost of employing older employees as a group is unlawful . . . " 29 CFR 1625.7(f).

Courts have found in other cases with facts like those here that the companies were in violation of the ADEA by targeting older workers for termination. In EEOC v. Sandia, 649 F.2d 1383 (10th Cir. 1980, the employer, like Xerox, announced that it must have a reduction in force to reduce costs. Like Xerox, the company ostensibly offered the opportunity to leave voluntarily with severance benefits. The court found however, that the employer had actually selected employees between 52 and 64 for RIF and that they had been coerced to leave in a deliberate strategy to reduce costs by eliminating those who made the highest salaries and who were close to getting retirement benefits.

In considering whether employers have violated the ADEA, courts have consistently held that in order to establish a prima facie case of age discrimination terminated employees do not have to show they were replaced in exactly the same job. They must show only that there were jobs available which they were qualified to perform and that younger persons were treated more favorably. See e.g. Hagelthorn v. Kennecott Corp., 33 FEP 977(2nd Cir. 1983); Williams v. General Motors, 656 F.2d 120 (5th Cir. 1981). It is well settled that if an employee can present evidence that he was forced to retire or resign, then his resignation or retirement is involuntary. EEOC v. Chrysler Corp. 546 F.Supp. 54, 69 (E.D.Mich. 1982): aff'd. 733 F. 2d 749 (6th Cir. 1984)

We have many times set out for Xerox our allegations of its specific actions which appear to be in violation of the ADEA, our evidence in support of those allegations, and the actions which the law requires Xerox to take in order to resolve the charge of discrimination. We have focused particularly on our evidence that many of the persons termed as voluntary terminees by Xerox were, in fact, forced to leave the company. Xerox has never rebutted our evidence and has never, except for the analysis of IRIFs presented by Dr. Medoff, discussed above, responded directly to our findings. Xerox has, on the subject of voluntary RIFs, consistently refused to provide information. The total support it has offered on this central dispute is its statement that we should believe them when they say the programs were entirely voluntary.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

MAR -3 1987

MEMORANDUM

TO : William H. Ng
Deputy General Counsel

FROM : Richard D. Komer Richard D. Komer
Acting Legal Counsel

SUBJECT : Cipriano v. Board of Education

We have reviewed your office's memorandum to the Commission regarding the Cipriano early retirement incentive (ERI). As we have discussed, we are outlining in this memorandum additional issues and options that we believe should be brought to the Commission's attention. It is our understanding that this memorandum will be attached to your action memorandum for transmittal to the Commission. Because of the time constraints involved, we are attempting to highlight the pertinent issues rather than to provide an exhaustive analysis.

I. Choice of Action

Your office recommends that the Commission intervene in the District Court case, as requested by the District Court Judge. The Commission should consider providing a document to the court which is narrow in scope for the following reasons: First, the 1986 ADEA amendments in the Omnibus Budget Reconciliation Act, H.R. 5300, which added section 4(i) to the ADEA, will have a significant impact upon the ERI issue. It is our view that after the effective date of section 4(i), generally in 1988, benefits under an ERI would be covered under section 4(i) rather than under section 4(f)(2). Assuming our view is correct, an ERI rule promulgated under section 4(f)(2) would have a very short lifespan. The Commission may prefer that any action in the Cipriano case, under section 4(f)(2), be narrowly focused rather than wide-ranging.

Secondly, as you are aware, the Commission has been considering a draft ERI Opinion Letter requested by the Michigan Education Association.

Finally, considering the peculiar facts of the Cipriano case, as outlined in your memorandum, and considering that Judge Friendly's opinion has locked the District Court into several key legal positions (i.e., that the plan violated section 4(a)(1), that the plan potentially is eligible for the section 4(f)(2) exception), this case might not be the most appropriate forum for setting overall policy. Rather, an Opinion Letter (or a Policy Statement) might present a more workable medium for establishing such policy. 1/

II. Legal Analysis

In our view, there are three primary legal theories under which the Cipriano plan could be analyzed.

1/ Indeed, the Commission may wish to participate as amicus, rather than as an intervenor, so that we would not be so closely bound to the "law of the case."

A. Option I

As indicated in your memorandum, one could determine that the ERI was "not so closely related to the retirement plan as to be swept into section 4(f)(2)'s coverage." General Counsel Memo, at p. 27. 2/ Such a position could be viewed as consistent with prior Commission positions in such cases as Westinghouse and Borden's. (Those cases, however, did not involve retirement incentives but rather severance pay after plant closings.)

Under this approach, the analysis would be limited to determining whether or not the ERI violated the provisions of section 4(a)(1). In Cipriano, the Court of Appeals has already determined that such a violation has occurred. 3/ Under Option I, the inquiry would thus cease after the finding of a 4(a)(1) violation since the 4(f)(2) defense would be unavailable.

Assuming, however, that the District Court will follow the direction of the Court of Appeals in holding the ERI to be a section 4(f)(2) plan, the employer would have the burden of showing that the disadvantageous treatment of older employees was not a subterfuge to evade the purposes of the Act. With respect to most employee benefit plans, the employer can demonstrate lack of subterfuge generally only by showing "that the lower level of benefits for older persons is justified by age-related cost considerations." 29 C.F.R. 860.120(d). 4/ It is extremely unlikely that the employer in Cipriano could make such a showing.

B. Option II

A second alternative would be to analyze the ERI and the underlying pension plan as a unit, rather than as two discrete plans. This option is consistent with the Circuit Court opinion which found the ERI to be a "supplement" to the main pension plan. 5/ The Court would analyze the case in the same way as under Option I, except that the plan at issue would be the pension plan/ERI combination, not just the ERI standing alone. The Court would combine the benefits available in the ERI and pension plan for purposes of the section 4(a)(1) analysis. Thus, while the ERI alone might provide greater benefits for younger employees than for older employees, a section 4(a)(1) violation, the ERI plus the pension benefit might provide equal or greater benefits for the older employees and the combination could be in compliance with section 4(a)(1). 6/ Under Option II, we would argue that a section 4(f)(2) analysis would be appropriate should a section 4(a)(1) violation be shown, even had the Court of Appeals not already stated that section 4(f)(2) is applicable.

2/ While the Court of Appeals determined that the ERI was a section 4(f)(2) plan, such finding may still be open to challenge.

3/ But see Option III for a contrasting viewpoint.

4/ The next sentence of that section reads: "The only exception to this general rule is with respect to certain retirement plans." The exception, while not completely clear, seems to indicate that "age-related cost considerations" can never be a justification for the lowering of pension benefits for employees who have not attained normal-retirement age. Such a reading of the regulation would be inconsistent with the reading of section 4(f)(2) taken by the Commission in the 1979-1986 post-normal retirement age benefit accrual rules project.

5/ In Westinghouse, the court refused to compare pension benefits to non-pension (severance) benefits, considering the two benefits to be unrelated in substance. Such view is supported by 29 C.F.R. 860.120(f)(2), which states that a pension benefit and a non-pension benefit cannot be compared, for section 4(f)(2) purposes, as a "benefit package." However, there is no reason provided in the regulation why two pension benefits cannot be compared, or combined.

6/ The ERI, under the ERISA definition, would be a pension plan. Section 3(2)(A) of ERISA. While the Department of Labor carved out such ERISA employee benefit plans as sick leave or vacation pay plans from the section 4(f)(2) definition of "employee benefit plans," there does not seem to be any such justification for removing ERI's from the section 4(f)(2) definition.

C. Option III

In Options I and II, it was assumed that since the Cipriano plan paid lower benefits to retiring employees over the age of 60 than to retiring employees between the ages of 55 and 60, a section 4(a)(1) violation existed. In this Option, however, we consider alternative theories under which no section 4(a)(1) violation would exist.

(1) The employer claims that all employees had, at some point, an opportunity to participate in the ERI. Assuming the employer's claim is correct, employees age 60 at the time the ERI was adopted had only one year to decide on acceptance, while employees age 55 at that time had five years to decide. The fact remains, however, that all employees, including Ms. Cipriano, could have retired at or before the age of 60 and could have received the ERI bonus. Ms. Cipriano, in choosing voluntarily to continue in the employ of the employer, voluntarily waived her right to receive the ERI. Even though today a 60-year-old employee could retire with an ERI bonus, while Ms. Cipriano could not, the younger employee only would be exercising an option that Ms. Cipriano voluntarily waived at age 60.

(2) The ERI could also be viewed as a salary replacement plan, similar to the analysis in Britt v. E.I. duPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985). Since the younger employees are foregoing more years of potential earnings than are the older employees, then arguably they are entitled to a larger salary replacement. Citing to Patterson v. Independent School District, 742 F.2d 465 (8th Cir. 1984), the Britt Court made the following observation:

> . . . [T]he severance payments for giving up the contract right to work represented compensation. Since a younger worker gives up the right to work for a longer period of time, the sliding scale of diminishing benefits was appropriate, and instead of representing discrimination on the basis of age, simply reflected the reality that younger workers deserved more wage-substitute pay than an older worker closer to retirement age . . .

Britt, 742 F.2d at 595 n. 4. It is not inconceivable that this approach, combined with the fact that the older workers in Cipriano (those over 60) were not being encouraged to give up their contract right to continue work (no incentive available after 60), would lead a court to conclude that a Cipriano-type plan does not violate section 4(a)(1).

III. Recommendation

Since the 1986 ADEA amendments may render the section 4(a)(1)/4(f)(2) analysis herein moot for most cases arising after 1987, we recommend that the Commission not attempt in the Cipriano case to set a sweeping statement of policy. Rather, it should provide the minimum input that is consistent with its duty to the court. With regard to the three options set forth in Part II, we believe reasonable arguments can be made for each of them.

We will be available to join with you in your briefing of the Commissioners should you desire.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

Jenkins

MAR 10 1987

MEMORANDUM

TO : Clarence Thomas, Chairman
R. Gaull Silberman, Vice Chairman
Tony E. Gallegos, Commissioner
Fred W. Alvarez, Commissioner

FROM : William H. Ng
Deputy General Counsel

SUBJECT : Background information for the briefing on the status of the directed investigation of Xerox Corporation.

In response to the request for background information, we are forwarding copies of a proposed presentation memorandum, which we received from Systemic Litigation Services on March 9, 1987, on the above indicated case. The presentation memorandum has not been thoroughly reviewed or approved by this office. We are forwarding the document only for the purpose of providing basic information on the history and nature of the case.

cc: James N. Finney
Associate General Counsel
Systemic Litigation Services

PRESENTATION MEMORANDUM

Direct Suit

I. Introductory Information

A. Parties:

1. Defendant: Xerox Corporation
2. Plaintiff: EEOC, on behalf of a class of former Xerox employees

B. Commission Charges: Pursuant to the procedures set out in Section 7(b) of the ADEA, the Commission issued a Letter of Violation to Xerox on April 19, 1984. Three prospective plaintiffs in this proposed lawsuit have filed charges alleging class-wide age discrimination.

C. Location of Facilities: Xerox corporate headquarters are in Stamford, Connecticut, while its facilities are located nationwide. Most of the facilities upon which this proposed lawsuit is focused are located in New York state, California, and Texas. The lawsuit would be filed in the Southern District of New York.

D. **Size of Work Force:** The number of salaried employees in Xerox and its subsidiaries is about 56,000. The Commission's suit would be limited to former salaried employees.

E. **Nature of the Proposed Suit:** The Commission's proposed complaint alleges that the Xerox Corporation wilfully and deliberately discriminated against a class of salaried employees aged from 40 to 70 on the basis of their age in terminating them involuntarily and forcing them to retire while younger people were simultaneously being hired or retained to perform the same work. The suit would be limited to those who were terminated between April 1, 1983 and the date of the filing of the lawsuit. Included in that group are sales workers, engineers, administrators, financial analysts and marketing representatives.

The relief sought by the Commission on behalf of these illegally terminated employees would include reinstatement where appropriate, back pay, adjustment of pension benefits and any necessary adjustment of health or life insurance benefits.

II. Nature of Defendant's Business

The Xerox Corporation is a major nationwide company whose business includes the manufacture, research and sales of computers, reproduction and business information systems, facsimile communications products, office products, and other related activities. Xerox subsidiaries include Ginn Publishing, Western Union, and Versatec Systems. Xerox facilities are are concentrated in the northeast, particularly in upper New York state; around Dallas, Texas, and in California. Personnel policy decisions, systems, and records are centralized in the corporate headquarters in Stamford, Connecticut.

III. Administrative Record

A. Summary Case Processing Chronology

1. Dates Charges Filed: A Letter of Violation (LOV) was issued April 19, 1984. Individual charges alleging class-wide age discrimination were filed by three persons who are prospecive class members in the lawsuit.
2. Dates of Determinations: no determinations have been made by the Commission on individual charges.

B. Administrative Record--Narrative

1. Direct Investigation by headquarters Systemic Programs was begun on February 7, 1984.
2. Based on the pattern of violation found during its nationwide investigation, the Commission issued a Letter of Violation on April 19, 1984 that commenced conciliation pursuant to Section 7(b) of the ADEA.
3. Conciliation efforts have continued since issuance of the LOV. During the entire investigation and conciliation Xerox has been uncooperative in supplying requested data. Xerox has consistently maintained that its actions were not discriminatory and has refused to discuss its voluntary Reduction in Force programs during conciliation. Xerox has declined to consider any broad based settlement and relief to resolve the violations of the ADEA alleged in the LOV.

The Commission has fulfilled the standards to be met in conciliation. An independent investigation of the allegations of discrimination was conducted, Xerox has been presented with a summary of the evidence of age discrimination, and the attempt was made repeatedly to discuss means available to achieve voluntary compliance. Five formal conciliation meetings were held, in addition to correspondence and telephone conferences As provided by the Act, the statute was tolled for a year while the Commission conciliated.

As required during conciliation, Xerox was informed that the terminated employees can seek back pay, of the ways in which it could achieve voluntary compliance and of the possibility that the Commission would proceed to litigation should conciliation fail. In addition, Xerox was invited to express its views of the allegations of discrimination and the EEOC has carefully listened to and considered its presentations. Xerox consistently maintained that it would conciliate only on the basis of some individual complaints and would not address any of its overall policies.

After our last meeting, on January 14, 1987, the Commission gave formal notice to Xerox that

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conciliation has failed. During the meeting, and in the EEOC's letter of February 5, 1987 (attachment A) we outlined our findings and informed Xerox that, in light of our evidence, the inquiry and potential relief cannot be reduced to a few isolated individual persons.

Xerox has refused our offer to continue conciliation discussions in return for its agreement to a general tolling of the statute.

IV. Scope of Proposed Suit

The proposed suit would be filed on behalf of a class of employees who were terminated from Xerox after March 31, 1983, who were over 40 years of age at their terminations, and who allege that their termination was caused by illegal age discrimination. Forty-eight of these class members are presently identified, as they attempted to opt into private ADEA litigation now pending against Xerox. (see infra) These individuals' claims were outside the time period covered by that suit and they consequently sought the Commission's assistance in pressing their claims of discrimination. From the information available, it appears that the maximum number of prospective class members would total approximately 200. The suit would involve three Xerox divisions which have been most heavily implicated in the involuntary terminations of older workers. Most of this group of 48 known class members were in professional positions such as engineer or were sales representatives. As noted above, the relief sought for this group includes back pay, reinstatement, and adjustment of retirement benefits.

The geographical scope of the proposed suit is nationwid although its focus would be in New York, California and Texas The Xerox maintains,in its Connecticut headquarters, a centr ized computerized personnel data system containing records fo all employees nationwide. During the investigation, the EEOC developed and organized a computerized data base, from the Xerox records, which would be suitable for use during litigation.

The Commission's investigation has not found direct evidence of age discrimination in promotions or in hiring. Though evidence indicates that Xerox seldom hires persons over 40, no charge has been made by any unsuccessful applicant that alleges age discrimination. Many of those who were terminated allege that there were open jobs to which they could have been transferred as an alternative to termination. The Commission's suit would cover that aspect of an apparent discriminatory practice.

Our investigation has not uncovered any evidence of a pattern of discrimination on the basis of race, national origin, or sex. There have been some charges making those allegations, but upon review the allegations were found to reflect an individual incident or to be insufficient to support a cause determination.

V. Other Related Actions

Lusardi v. Xerox, (D.N.J.) a class action suit alleging company wide age discrimination by Xerox, was filed March 8, 1983. The original Lusardi plaintiffs were sales representatives who were terminated after long and successful careers with Xerox. They filed charges of discrimination with the EEOC when they learned that they had been replaced by younger new hires. The court has established a cut-off date, so that those eligible to opt-in as plaintiffs in that suit are those whose cause of action arose on or before March 31, 1983. Over 1300 plaintiffs have opted into this lawsuit which alleges across the board age discrimination against all present and former employees aged 40 to 70.

Preliminary discovery conducted in this suit has supported allegations by the plaintiffs that Xerox, beginning in late 1981, designed and implemented a massive program to get rid of older, higher paid employees and replace them with lower paid new hires in an effort to cut costs. The court in Lusardi has allowed the plaintiffs to select a random sample of 50 plaintiffs and to develop extensive evidence on their treatment in order to establish plaintiffs' prima facie case. If plaintiffs demonstrate a prima facie case for the persons in this sample, the court will allow the plaintiffs to maintain the lawsuit as a class action under §16(b) of the Fair Labor Standards Act and to expand the discovery beyond the sample group.

After appointment of a new judge to the case, Xerox filed a motion to decertify the Lusardi class. The plaintiffs responded with a cross motion for summary judgment. Oral argument was heard on this question in late February, but no decision has been issued as of this date.

All the litigation in this case to date has concerned procedural questions. Xerox has filed and lost five appeals in the Third Circuit regarding procedural aspects of filing and maintaining such a suit as a class action. Substantial discovery has been taken, both as to the sample group of 50 and as to general issues. There has been, as yet, no evidentiary hearing on the merits.

VI. PROOF

A. General EEO-1 Profile

The proposed EEOC suit would cover only former salaried employees who were aged from 40 to 70 when they were terminated and who were terminated after March 31, 1983. The following general information regarding the Xerox workforce is of interest. According to the 1986 EEO-1 Report, Xerox employed 68,143 persons, of whom 8175(12%) are black, 3746 (5.5%) are Hispanic, and 26,438 (38.8%) are women. The same statistics for the combined categories of officials and managers, professionals, and sales workers are as follows: Total 29,000; black: 2652 (9.1%); Hispanic: 867 (3%); women: 8427 (29%).

B. Proof of Issues for Suit

Evidence concerning possible age discrimination by Xerox has been gathered from many sources, including interviews with charging parties, potential plaintiffs, and plaintiffs in the Lusardi lawsuit; statistical analyses prepared by an outside expert, information submitted by Xerox, and information obtained during discovery in the private lawsuit.

Although we have narrowed our focus to the time period beginnin April 1, 1983, the employment policies of Xerox and the specific circumstances of the terminations of our group of prospective plaintiffs should be examined within the context of the actions of Xerox taken between 1980 and March 31, 1983. It is clear that these actions are directly related to the discrimination which continued throughout the period at issue here. Consequently some of the evidence discussed is from this earlier period.

Evidence of Companywide Pattern of Age Discrimination

The issues in this proposed lawsuit arose when the Xerox Corporation, in response to financial pressures, undertook extensive restructuring and organizational changes in order to become more competitive in the high technology industry. The evidence obtained by the Commission shows that Xerox embarked on a conscious and deliberate program of eliminating older, higher paid employees and by replacing them with younger new hires. Such a program is violative of the ADEA's strictures against making adverse employment decisions on the basis of age. Xerox accomplished this end through involuntary reductions in force (IRIF) and through coercing older employees to accept what it termed "voluntary" programs (VRIF). The company not only saved money in salaries but also was able to reduce its costs in contributions to employees' retirement accounts, as those contributions are computed as a percentage of employee salaries.

This program to replace older workers with new hires was most intense in 1981 and 1982. The filing of the _Lusardi_ lawsuit in March, 1983 corresponds with a sudden drop in the number of forced early retirements, but the terminations of older workers continued through 1983 and into 1984.

It appears that Xerox is presently reactivating its effort to eliminate older workers. On October 16, 1986 Xerox announced that it plans to reduce its professional workforce by offering early retirement benefits to 4000 of its senior employees. The newspaper account (Attachment B) quotes Xerox officials as stating that lay-offs will be necessary if too few older workers take advantage of this offer.

Throughout the investigation and conciliation, Xerox has maintained that a massive reduction in its workforce was necessary to reduce costs and that this reduction was accomplished by voluntary terminations and through the use of objective criteria for the necessary periodic involuntary terminations.

The evidence shows that from 1980 through 1983, Xerox actually hired many more employees than the number who left. 1/ College recruitment and hiring continued throughout the period. New college hires, put into the same engineering jobs from which older employees were being terminated, by an explicit Xerox policy, were exempt from consideration for IRIFs. Rather than reducing the number of employees, Xerox was replacing the older, highly paid professionals with new hires who are much younger. Several sources who were high level Xerox officials have independently described a pattern of directives orally issued to midlevel managers at meetings that that they must get rid of the "old-timers" and that they must "counsel out" these employees.

There is extensive evidence, both anecdotal and documentary, that the elimination of older workers from the Xerox workforce was a corporate policy. Memoranda circulated at the highest levels of Xerox corporate management state that its "maturing,

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1/ The computerized personnel records obtained by the EEOC from Xerox have a cut-off date of December 31, 1983, which was immediately prior to our first request for information. Requests to Xerox to furnish updated personnel data have been refused.

aging workforce" is a hindrance and a "constraint." Examination of company personnel policies, along with exerpts from depositions and internal memoranda, demonstrate that the policies regarding reductions in force were developed and directed from the corporate levels of Xerox (Attachment C).

Voluntary reductions in force (VRIFs), with an offer of severance benefits, were always followed by an involuntary RIF (IRIF). Older workers were "counselled" that failure to take the "voluntary" offer would result in termination with no benefits. Corporate directions for managers in divisions about to undertake reductions in force were instructed to advise potential retirees that this offer of would not be made again. At the same time, lists were drawn up showing those who were "vulnerable" in the next IRIF. At issue in particular is the Bridge to Retirement program which was made available to employees aged 51 1/2 and gave them 15 months salary spread over 30 months. There is extensive evidence that those eligible for the program were told that if they did not take it voluntarily, they would be involuntarily terminated in the next IRIF and would get no benefits.

The evidence which outlines a deliberate corporate policy of getting rid of its older workers dates from 1982 and 1983. We fully expect that during discovery we can obtain similar evidence regarding the post 1983 time period.

Because the official Xerox policy concerning reductions in force is to choose those for termination who have the lowest tenure, absent age discrimination we would expect that the majority of terminees would be younger, newer employees. Instead, we have found that not only were most terminees over 40 but that the number of terminees over 40 was consistently disproportionately large compared to the ages of the Xerox workforce. An internal Xerox analysis of RIFs in the Reprographic Business Group shows that persons over 40 were a disproportionately large segment of even the IRIFs (Attachment D).

Analysis of computerized personnel records supplied by Xerox shows that from 1980 through 1983 Xerox RIFed 2598 salaried personnel 2/ who were aged 40 or more at termination, while

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2/ We have used Total RIPS which are the combined voluntary and involuntary RIFs. The reason for using this total is discussed in the following pages.

22,768 persons under 40 were hired for the same job categories. In 1983, the specific period on which our proposed lawsuit focuses, 559 persons were RIFed, of whom 65.5% were over 40. During the same year, there were 5711 new hires, only 6.7% of whom were over 40. The Commission's investigation has confirmed that many of these new hires filled exactly the same positions as those older workers were leaving. During this year when 65.5% of the RIFs were of persons over 40, only 36.% of the Xerox salaried workforce was 40 or more.

The major job categories affected by the RIFs were engineering, sales and sales management, support services, editorial and publishing positions, technical and customer service, scientific and research positions. There were 47 RIFs in Engineering in 1983, while at the same time there were 325 new hires. The average age of the new hires was 28.5, while the average age of those RIFed was 46.2. During that year, there were also 21 RIFs in Sales and Sales Management, while there were 1441 hires in this category. Throughout the period Xerox advertised extensively in major newspapers around the country for applicants for sales positions. The ads typically sought persons with "from two to four years" experience.

While the statistical analysis shows a marked pattern of disproportionate impact on employees over 40, at issue is whether those person categorized by the company as voluntary RIFs truly volunteered. Xerox has, in its presentations to the EEOC and in defense of the private lawsuit, omitted so called "voluntary RIFs" as it asserts that those who left in this category could not have been discriminated against since leaving Xerox was their choice. While undoubtedly some who left were truly voluntary, the evidence is persuasive that that many who were termed as voluntary RIFs by Xerox only left as a result of coercion. We have therefore analyzed all RIFs together. Repeated requests to Xerox to furnish the names of the persons it contends were voluntary RIFs, so that Xerox's assertions could be verified, have been refused.

Even when only involuntary RIFs are examined, however, the evidence reveals that older workers were disproportionately chosen to be terminated, sometimes on the basis of purportedly "objective" criteria. As noted above, new college hires in the engineering divisions were exempt from consideration from IRIFs so that many older employees who were involuntarily

RIF'd were replaced by new employees aged 21 or 22 (Attachment E). In addition to this practice, Xerox developed a matrix of tenure and performance that it used to categorize persons in engineering divisions. The cells in this "objective" system, however, are not arranged to give equal consideration to those with most tenure. When asked, Xerox could not provide any objective rationale or method for its arrangement of cells in this matrix.

Victim Identification

Persons in the known prospective plaintiff group were terminated from Xerox during the period from April 1, 1983 to July 30, 1984. All but 15 of the group were terminated in 1983. Most of the group members worked for the Reprographic Business Group in Webster, New York, in which massive RIFs took place in late 1982 and early 1983. These RIFs continued at a slower rate throughout 1983.

The known 48 individuals have come to our attention through their efforts to join the private lawsuit and their charges of discrimination filed with the Commission. Although we have received extensive computerized personnel records, Xerox has consistently refused to furnish names of its employees or former employees. There is no practical way to identify individuals who have not come forward on their own. It is expected that during discovery additional individuals who allege discrimination on the basis of age will be identified. The number of additional potential plaintiffs is estimated to be a maximum of 200.

The group for whom relief was sought during conciliation and who would be plaintiffs in the lawsuit proposed here includes former engineers, managers, sales persons and clerical workers. Most of these former employees allege that they were forced to resign or retire when they were given the choice of taking a "voluntary" RIF program or being involuntarily RIF'd with no severance benefits. The group also includes several who were terminated involuntarily when divisions or plants closed or functions were moved elsewhere; in addition, there are four former employees of the U.S. Insurance Group, a Xerox subsidiary, who were fired with the allegation that their performance was inadequate.

Anecdotal Evidence

Typical of the allegations of age discrimination from the Reprographic Business Group in Webster, New York is the experience of a former business analyst. Mr. B., who worked in the accounting division of the RBG, at 53 was the oldest professional employee of 15 in his unit. After the announcement that the unit had to be reduced by three professional employees, Mr. B.'s manager told him that he was vulnerable to the involuntary RIF which was coming and that his only chance to get severance benefits was to take the early retirement program being offered. Mr. B had organized the unit several years before and had consistently received above average performance evaluations. There was no allegation that his performance was deficient in any way; rather, his manager told the employee that instructions had been given that he, the manager, was to get Mr. B. to leave. Although Mr.B. had the longest tenure in his department, he was the only one in the unit to leave the company at that time. The only two others in the department who were over 50, but younger than Mr. B., were moved from the accounting unit, but they were transferred to other departments. They left during a subsequent RIF. The 53 year old business analyst was replaced by a person in his early forties. Although the official Xerox policy is to transfer employees rather than terminate them, the open position to which Mr. B. sought to transfer was filled by a less qualified employee who is in his thirties. By taking the early retirement, Mr. B. has had his retirement benefit cut by about two thirds of the amount it would have been had he worked until 65, when he planned to retire. He was out of work for 2 years and the job he was able to get pays $12,000 less than his job at Xerox.

The following 53 year old terminated account executive is typical of the employees who took the Bridge to Retirement optio Mr. H. had worked for Xerox in its New York sales office for 20 years. For 18 of those years he had been a member of the President's Club (composed of employees who exceed their sales goals for the year). His last three performance ratings were 4's and 5's in a 5 point rating system. Nothing in Mr. H.'s record indicates that he was not a consistently good performer. He states categorically that he did not want to retire when he was asked to do so by his supervisor. However, he saw how "old timers" in his division were being assigned to unfamiliar and inferior territories in which they were unable to achieve their sales quotas. He felt that he had no alternative but to take the "voluntary" bridge to retirement option. He had planned to work until he was 65. As a result of his forced early retirement his life insurance was reduced from a $300,000 policy to $5,000, his medical benefits were reduced, his social security benefits will be reduced as a result of his lower earnings, and his benefit plan from Xerox, which was based on age 65 retirement, is much less than it would have been had he been allowed to continue working there. Although he is again working for another company, he has had to take a $27,000 pay cut.

The facts belie Xerox's assertion that those it terms "voluntary RIFs" chose to leave because some better alternative was open to them. Many of those in the group of prospective plaintiffs remain unemployed or have taken jobs which pay much less than they made at Xerox. Several have lost their houses, moved across the country to find work, and have been unable to continue to send their children to college. It is clear that the current economic circumstances of the prospective plaintiffs could hardly have been chosen voluntarily.

VII. CONCLUSION

In considering whether employers have violated the ADEA, courts have consistently held that in order to establish a prima facie case of age discrimination, terminated employees do not have to show they were replaced in exactly the same job. They must show only that there were jobs available which they were qualified to perform and that younger persons were treated more favorably. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 82 (2nd Cir. 1983). We have extensive evidence here that many prospective plaintiffs were replaced by a younger person in exactly the same job. There were many other jobs which they were qualified to perform and which were being filled regularly by younger new hires.

Plaintiffs may use both statistical evidence, which raises an inference of discrimination, and direct evidence to establish a prima facie case that their termination was based on age. EEOC v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980). In the Sandia case, as here, the employer undertook a reduction in force in order to lower its personnel costs. Sandia's purportedly objective system for ranking employees to be terminated was found to be illegally biased against its older workers.

As the agency charged with enforcement of the ADEA, the Commission has an obligation to be involved in important cases to the extent that it can help shape the development of case law and can insure that victims of illegal age discrimination are afforded appropriate relief. Although the number of persons in the prospective class is small here, the issue of forcing older workers out in order to save money is an important one of topical interest and wide implications in American society.

In addition, allegations of age discrimination by Xerox have been highly visibe. The Commission's investigation and Letter of Violation, along with the private lawsuit against Xerox, have been widely reported in newspapers around the country. During our investigation and conciliation we have received frequent Congressional inquiries as to the progress of our action in resolving the allegations of age discrimination against Xerox.

Based on the evidence that Xerox developed and implemented a deliberate~~/corporate~~ policy which resulted in a pattern of wilfull violations of the Age Discrimination in Employment Act, and upon the unwillingness of Xerox to conciliate within the requirements of the Act, we recommend that the Commission approve the filing of the attached complaint.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 5, 1987

Christina E. Clayton, Esquire
Assistant General Counsel
Personnel and Environmental Health
& Safety
Xerox Corporation
P.O. Box 1600
Stamford, Connecticut 06904

Re: EEOC v. Xerox Corporation

Dear Ms. Clayton:

We have received your letter of January 20, 1987. You feel we had reached a tentative agreement at our meeting on January 14, 1987. It is the Commission's understanding, based upon your letter, that Xerox will agree only to a tolling of the statute with regard to the individuals who have complained to the Commission and whose claims are being represented by us for purposes of conciliation. In return for this agreement, Xerox would, as soon as practical, but within three months, submit to the Commission the information that we requested in our letter of September 11, 1986, provided that the information requested is deemed by Xerox to be relevant, and such information is allowable under Rule 26 of the Federal Rules of Civil Procedure (F.R.C.P.).

With regard to the meeting which was held on January 14th, it was not our understanding that any tentative agreement had been reached. It was our understanding that you and the other Xerox representatives would return to Stamford and inquire from higher management whether it would be willing to agree to a general tolling of the Statute while conciliation efforts continued. If Xerox was willing to agree to that contingency, the Commission would provide the names of approximately 100 former Xerox employees. Xerox would, on a "rolling" basis, (to be completed within 3 months) provide the Commission with the information requested in our September 11, 1986 letter, provided the information requested was allowable under Rule 26, F.R.C.P. Upon receipt of this information, and any other position statement or information provided by Xerox, the Commission would analyze each claim and facilitate further discussions with Xerox on those claims and on the various practices which the Commission believes violate the Age Discrimination in Employment Act (ADEA).

Your letter makes it clear that there were different understandings reached at the January 14th meeting. You, also, appear to have clarified your position at that meeting by insisting upon unilateral determination by Xerox of whether information requested by the Commission is relevant. It was specifically asked at the meeting whether the scope of your determination to send the information requested was limited to the parameters of Rule 26, F.R.C.P. The response to the question was "yes."

This supplementation and Xerox's refusal to agree to a general tolling illustrate why it appears that further conciliation efforts will be futile. At this point, we believe it will be helpful to capture in this one letter the Commission's view and position on the processing of this charge to date.

On February 7, 1984, the Commission issued a letter commencing a directed investigation into possible ADEA violations. This investigation was triggered by a large number of charges that had been filed with the Commission around the country by individuals claiming to be adversely affected. Those alleged violations revolved around Xerox's series of programs designed to reduce through voluntary and involuntary means its labor force (RIFs).

The Commission conducted its investigation recognizing that the Statute of Limitations was running on all individual claims. To conduct its investigation, the Commission had included a detailed request for information in its February 7th letter. The Commission received some non-statistical general information on charging parties and policies in March, 1984. Xerox did not provide the crucial statistical and computerized data requested by the Commission at that time. Xerox complained about the volume of that information and specified that it would take a minimum of 26 weeks to provide that information to the Commission.

When some of that information was produced by Xerox in July of 1984, it was critically incomplete. Despite assurances by Phil Smith and others from Xerox that it contained all of the codes necessary to analyze the information, family job codes were missing. Lower level Xerox personnel verbally confirmed that they knew that all of the information (including the family job codes) was not produced. It was not until September, 1984, that Xerox supplied readable computer records.

During the time the Commission was experiencing the frustration of ascertaining the completeness of the information provided by Xerox, and trying to analyze that information, it also interviewed the charging parties and a large number of other former Xerox personnel, including an individual who assisted in the designing of the reduction in force plans. Their collective testimony indicated that the RIFs were implemented in an overwhelmingly involuntary fashion, and were designed to hit older workers the hardest. The Commission obtained copies of memoranda, one of which was presented to Xerox, which indicated that the programs were aimed at replacing longer tenured, higher paid employees of Xerox with lower cost new hires.

The Commission analyzed all of the information that Xerox had provided pursuant to the Commission's initial request for information. Our analysis revealed a disproportionate impact on protected age group members, both with regard to voluntary and involuntary terminations.

The above specified information from witnesses and Xerox, the failure of Xerox to provide all of the information specifically requested by the Commission (particularly the Commission request for the names, addresses and telephone numbers of all former Xerox employees who "voluntarily" resigned from Xerox during the period of time covered by the Commission's request), the receipt of misinformation concerning the completeness of the information presented by Xerox, along with the quickly passing statute of limitations, led to the issuance by the Commission of a Letter of Violation on April 19, 1984.

Xerox should note, and this point is important, the level of proof in an investigation is "reasonable cause" to believe that discrimination exists. This burden is an administrative one and is a significantly lesser burden than that imposed by a trial court. This burden was satisfied by weighing all aspects of the investigation that was completed within the time frames with which the Commission must comply to avoid sacrificing any potential claimant's rights. Xerox's own actions, inactions and delays contributed to our findings.

Further, the Commission wants Xerox to be abundantly clear on what was found. The Commission has found that Xerox engaged in a series of programs which violated the ADEA by involuntarily (or with the use of undue influence) operated to disproportionately terminate employees over the age of forty, and most particularly those over the age of fifty. These programs are diverse. The Commission does not know all of these programs because of the restrictions imposed by Xerox on what information it would release to the Commission. However, the Commission has reasonable cause to believe that there are several such programs. These programs have discriminated in their aim and in their implementation.

We continue to regard the issues here to be those of a pattern and practice of age discrimination, rather than a series of individual events. We regard the complaints of individuals who have come to our attention to be examples of policies and widespread practices that originated at Xerox Headquarters and were implemented in local facilities nationwide.

The Commission has not placed any artificial limitation on the time period during which Xerox has engaged in these practices. Any supposed limitation has been created by Xerox. It is without foundation, and not the result of anything the Commission has proffered.

We feel that we have made ample attempts to conciliate our findings. We held several meetings with Xerox in 1984, during which Xerox was permitted to present its position and view of its RIF programs. We listened, considered what was presented, but heard nothing that would justify altering our findings. Specifically, the Company's presentation on September 12, 1984 was overly simplistic and drawn against only two broad categories of age groups. The presentation solidified our finding that there were programs (eg., the bridge to retirement program) which were clearly, by definition, aimed at older workers, and which were implemented in a discriminatory fashion. Xerox's position concerning the "voluntariness" of the programs was in direct contradiction to hundreds of interviews of former employees. Moreover, Xerox's refusal to provide the Commission with the names of "voluntary RIFs" lent further incredibility to Xerox's position. We firmly believe that a good many, if not most of these "voluntary" terminations were not voluntary, but were involuntary.

We held additional meetings, and telephone conversations with representatives from Xerox. In a last effort to resolve this matter, the Commission offered to provide the names of potential victims, in exchange for certain information pertaining to them and similarly situated individuals and a general tolling of the Statute. This has been rejected by Xerox. Xerox has said it refuses to conciliate on the "voluntary RIF program." Moreover, Xerox continues to insist that there is no issue of pattern and practice discrimination, but merely, perhaps, isolated instances.

In a nutshell, for conciliation purposes only, the Commission insists upon Xerox making offers of reinstatement to the persons for which the Commission is willing to provide names who were adversely affected by Xerox's policies, making back pay arrangements to these individuals, adjusting pension and other benefits, and eradicating all policies and practices which operate to involuntarily terminate protected age group workers. We would also insist upon a general tolling of the statute of limitations for all victims since March 31, 1983. We, again, offer these parameters to Xerox. If within five (5) days of the receipt of this letter, Xerox has not accepted these general terms, we have no alternative but to deem conciliation to have failed pursuant to Section 7(b) of the ADEA, and Systemic Litigation Services will seek authority from the Commissioners to file suit.

Sincerely,

James N. Finney
Associate General Counsel
Systemic Litigation Services

ATTACHMENT B

NEW YORK TIMES 10/16/86

(Chemicals, and chief op- Anthony F. Mas- of Diversified, executive vice presi- chief financial officer. Aris- would have its headquartered in rgh and employ 1,700.

ar this year, proceeds from set sales amount to some $350 . This would raise the total to t $850 million — well above the ny's $500 million objective for ar.

company is the a takeover attempt, of the Amerada Hess Corporation rose strongly on the New York Stock Exchange yesterday. The stock gained $1.875 to close at $26.875, and with four million shares changing hands, Hess was the Big Board's most active issue.

This marked the second time in less than two weeks that takeover rumors have swirled about the nation's 14th-largest oil company. T. Boone Pickens, the Texas oilman, has been rumored to be buying substantial chunks of Hess shares.

Attempts to reach Leon Hess, the chairman, at his company's Manhattan headquarters and Mr. Pickens for comment were not successful.

On Sept. 30 Amerada Hess shares closed at $19.375, but by Oct. 8 they had advanced to $25.75. The low for the year was $16.50.

Oil industry analysts yesterday said that the stock's recent movement in price and volume was intriguing. But they added that the reasons for the activity — and whether and why Mr. Pickens is buying shares — remained unclear.

umman Jobs Cut

HPAGE, L.I., Oct. 15 (Reu- – The Grumman Corporation a technical services division tified 189 employees at Van- g Air Force Base in California eir employment would be ter- d Oct. 31. The Air Force had ced earlier this month that ntractor jobs at Vandenberg be eliminated because the shuttle complex at the base not be operational until 1992.

)nly Slight Changes

discount brokerage unit, say- t that is a business "we want to e."

Clausen said that while the eeded to increase its equity, it not consider an equity offering e the stock price was so low. ources close to the bank have ted that it is considering a pri- ck placement with wealthy in- or some sort of preferred ffering to raise money.

Clausen also said he was not ed about taking the job Mon- ning, Oct. 6. That was the day rd of directors of BankAmer- to discuss a recently received r offer from First Interstate ided to change management.

ed Scenario

Clausen said he got a call at 4., Eastern time, from John R. , the chairman of the Bank- s board's executive commit- y initial reaction was one of e surprise and may I say even shock," Mr. Clausen said, adding that he had little hesitancy about taking the job.

The account, which differs from earlier reports from banking sources, who said Mr. Clausen was contacted on Oct. 4, implies that First Interstate's bid stirred the board to replace management. Mr. Clausen, who had run BankAmerica from 1970 through early 1981, before leaving to head the World Bank, was brought in on Sunday to replace Samuel H. Armacost, who was forced to resign.

Regarding the takeover bid, Mr. Clausen said his official stance was that the BankAmerica directors had asked for more information from First Interstate and would decide on the matter after receiving that information.

As a personal opinion, however, "I remain to be convinced that the First Interstate Bank is in the best interests of shareholders." On Tuesday, in a talk to 200 senior executives, Mr. Clausen is reported to have gone further, saying the bank would reject the offer.

Unanswered Questions

In the news conference, which lasted half an hour, Mr. Clausen declined to say how long h

etirement Offer For 4,000 at Xerox

By ERIC SCHMITT

The Xerox Corporation, hurt by declining sales of office equipment and seeking to cut costs, offered enhanced early retirement benefits to 4,000 of its senior employees yesterday.

Xerox said no workers would be laid off, but industry analysts said that the company might resort to layoffs if it judges that employment levels have not been reduced enough.

The action comes as many major corporations, including I.B.M. and Burroughs, are tightening their belts by offering older employees with high salaries financial incentives to leave. Some economists have expressed concern at the loss of more and more of these productive workers.

"The program is part of a continuing effort to improve our competitive strength by reducing costs," said David T. Kearns, Xerox's chairman and chief executive.

Thomas C. Abbott, a Xerox spokesman, declined to say how much the early retirements might save the company, which is based in Stamford, Conn. Mr. Abbott said that no target for employment reductions had been set, but he added that Xerox expects about 1,300 workers to accept the offer, based on the experience of other companies with similar plans. Xerox has 60,000 American employees.

Brian R. Fernandez, an analyst at Nomura Securities, said that as many as 2,500 Xerox employees nationwide might take advantage of the sweetened retirement benefits, saving the company about $75 million a year in salaries and benefit expenses.

About 1,800 of the employees who are eligible for the increased benefits work in the Rochester area, where Xerox manufactures most of its copiers and duplicating machines.

Wall Street reacted favorably to the announcement. Xerox's stock closed at $56, up $1.875 a share, in trading yesterday on the New York Stock Exchange.

"It's the in thing to do," said Daniel Mandresh, an analyst with Merrill Lynch. "It's appropriate and expected belt-tightening."

Under Xerox's amended early retirement plan, employees who are at least 50 years old and have 10 years of company service as of Dec. 31 qualify for the increased retirement benefits. Eligible employees would be credited with five additional years of service and age in the calculation of benefits. In addition, workers younger than 62 would receive a Social Security supplement until they turned 62.

Under the existing plan, early retirement is not available until an employee is 55 with 10 years' service.

Eastern Push In Philadelphia

Citing increased consumer interest in domestic travel and a desire to strengthen its position on the East Coast, Eastern Airlines said it would nearly double the number of flights from Philadelphia, making that city a hub between the Northeast and Florida, the Caribbean and the Bahamas.

Beginning Dec. 10, the Miami-based airline will operate 60 round-trip flights daily from Philadelphia. Eastern currently operates 30 round-trip flights each day.

New nonstop daily flights from Philadelphia will be added to Albany; Rochester; Hartford; Fort Myers, Sarasota and West Palm Beach, Fla., and Nassau, the Bahamas. In addition, a second flight will be added to San Juan, P.R., and flights will be increased between Philadelphia and Boston; Syracuse, and Miami, Orlando and Tampa, Fla.

In all, Eastern will operate 21 round-trip flights daily between Philadelphia and Florida, an increase of nine from last year.

"This is part of our effort to expand and grow in areas that we have traditionally been strong in," said Paula Musto, a spokesman for the company. "The Florida vacation market is growing strong, and Philadelphia, a strong market for us, doesn't really have a dominant airline yet."

Campeau Extends Its Offer for Allied

The Campeau Corporation has extended its tender offer for shares of the Allied Stores Corporation until Oct. 24, including withdrawal rights and proration. The $66-a-share offer in cash and stock was to have expired at midnight Tuesday.

Campeau said that 38.4 million shares, or more than two-thirds of Allied's stock outstanding, had already been tendered. In a letter to Allied yesterday, the Toronto-based company again asked the retail chain to rescind its shareholders' rights plan and its breakup fees to the com

ATTACHMENT C

CSO FIELD STRUCTURE

TASK FORCE

- OBJECTIVE
  - CENTRALIZED/CONSOLIDATE CUSTOMER SUPPORT FUNCTIONS (ADMIN., WORK SUPPORT, FIELD TRAINING, EQUIPMENT CONTROL, AFTER SALE SERVICES) OUT OF BRANCHES AND INTO 10 REGION CITIES.
- PILOT IN DALLAS IN 1983, NATIONAL LAUNCH IN 1984/85.
- ON GOING SAVINGS ... $26 MILLION (HEADCOUNT REDUCTIONS AND RIFFING HIGHER PAID/MORE TENURED PEOPLE WITH GRADE 3 ENTRY LEVEL)
- ONE TIME IMPLEMENTATION COST ... $30 MILLION (CONTINUANCE, RELOCATION, TRAINING)
- NET SAVINGS/COST:

1983/84	1985	1986
$ (14.8)	$ 8.3	$ 25.0

- LOW COST CITIES ALTERNATIVE RESULTS IN ADDITIONAL ANNUALIZED SAVINGS OF $9M. THIS RESULTS IN 85% INEXPERIENCED PEOPLE VERSYS 55% UNDER THE REGION CITY PROPOSAL.
- REMAINING BRANCH ORGANIZATION WOULD BE SALES/TECHNICAL SERVICE.

11/11/82
DY 1:8:cb

BUSINESS SYSTEMS GROUP
1983/1984 OPERATING PLAN
MANPOWER REVIEW

THEMES

- SUBSTANTIAL HEADCOUNT REDUCTIONS TAKEN, ESPECIALLY IN REPROGRAPHICS.
- REPROGRAPHICS ACTIONS REPRESENT 16% HEADCOUNT REDUCTION SINCE 1981; PRODUCTIVITY GREATER THAN THAT LEVEL DUE TO OFFSETTING VOLUME GROWTH.
- ACTIONS TAKEN INCLUDE RHQ RESTRUCTURE, LOW COST HIRES HIRING LIMITATIONS.
- FURTHER PRODUCTIVITY PLANNED FOR 83/84 - ISSUE IS REALISM OF FURTHER TASKS BEYOND THOSE PLANNED.
- OTHER BUSINESS GROWTH MUST BE EVALUATED ON A BUSINESS-BY-BUSINESS BASIS AND APPROPRIATE DECISIONS REACHED.
- FUNCTIONAL HEADCOUNT LEVELS MIRROR OVERALL REDUCTIONS.

XEROX CONFIDENTIAL

Xerox
Private
Data

MANPOWER PLANNING PROCESS

1. REVIEW YOUR REVISED MANPOWER CEILINGS, WHICH REFLECT ACHIEVEMENT OF A 0.8 TO 1.0 TARGET RATIO BY SEPTEMBER 13, 1982.

2. DETERMINE AN ORGANIZATIONAL STRUCTURE, FOR YOUR RESIZED BUSINESS, WHICH ALLOWS YOU TO MAINTAIN QUALITY, COST EFFECTIVENESS AND SCHEDULE.

   a. MANAGEMENT

      PARTICULAR ATTENTION SHOULD BE FOCUSED ON ELIMINATING LEVELS OF MANAGEMENT AND INCREASING SPANS OF CONTROL.

   b. INDIVIDUAL CONTRIBUTORS

      CONSIDER NECESSARY STAFFING LEVELS AND GRADE LEVEL DISTRIBUTION IN EACH GENERIC JOB FAMILY, e.g., NUMBER OF FOREMAN, ENGINEERS, EXPEDITORS, SECRETARIES, ETC.

3. IDENTIFY AND LIST THE SKILL REQUIREMENTS FOR POSITIONS IN THE NEW/RESIZED ORGANIZATION. THESE REQUIREMENTS SHOULD INCLUDE TECHNICAL, ADMINISTRATIVE AND MANAGERIAL SKILLS AS APPROPRIATE.

4. SELECT EMPLOYEES TO STAFF POSITIONS/REQUIREMENTS IN YOUR NEW/RESIZED ORGANIZATION.

   - CONSIDER EMPLOYEES:
     - SKILL KNOWLEDGE, UNIQUENESS AND FLEXIBILITY
     - PAST EXPERIENCES AND EDUCATION
   - IN ADDITION, FOR MANAGEMENT POSITIONS ALSO CONSIDER EMPLOYEES:
     - HUMAN RESOURCE MANAGEMENT/ADMINISTRATIVE SKILLS
     - ABILITY TO ACHIEVE RESULTS IN COST EFFECTIVE MANNER.

5. IDENTIFY EMPLOYEES YOU WOULD PREFER TO SEE LEAVE THE COMPANY e.g., WEAK/MARGINAL PERFORMERS, LIMITED GROWTH POTENTIAL, LACK OF/LIMITED SKILLS NECESSARY IN RESIZED ORGANIZATION, ETC.

   - DEVELOP CONSTRUCTIVE, NON-THREATENING, PLANS TO ENCOURAGE/COACH THESE IDENTIFIED EMPLOYEES TO CONSIDER VOLUNTARY REDUCTION IN FORCE.

XEROX CONFIDENTIAL

Xerox Privat Data

MANPOWER PLANNING PROCESS

6. DEVELOP YOUR PRELIMINARY REDUCTION IN FORCE (RIF) LIST USING THE PERFORMANCE/SERVICE MATRIX.

7. SCRUTINIZE YOUR RIF LIST TO REMOVE ESSENTIAL EMPLOYEES, i.e., THOSE YOU NEED TO RUN THE RESIZED BUSINESS (AS IDENTIFIED IN STEP 4).

   - REVIEW YOUR LIST OF ESSENTIAL EMPLOYEES AND DOCUMENT THEIR RIF EXCLUSION AS "CRITICAL SKILLS", "HIGH POTENTIAL" OR "RECENT NEW COLLEGE HIRE".

8. REVISE YOUR PRELIMINARY RIF (DEVELOPED STEP 6) LIST TO COMPENSATE FOR YOUR REMOVALS IN STEP 7.

   a. **MANAGEMENT**

   - ENSURE APPROPRIATE NUMBER OF MANAGERS HAVE BEEN IDENTIFIED TO REFLECT ELIMINATION OF ORGANIZATIONAL LEVELS AND INCREASE SPANS OF CONTROL. SURPLUSED MANAGERS WILL BE EITHER REASSIGNED/DOWNGRADED OR RIFED BASED ON GUIDELINES AVAILABLE FROM YOUR PERSONNEL MANAGER.

   - YOUR RESIZED ORGANIZATIONAL STRUCTURE WILL BE REVIEWED BY SENIOR DIVISION MANAGEMENT TO ASSURE APROPRIATE MANAGEMENT REDUCTIONS HAVE BEEN PLANNED.

   b. **INDIVIDUAL CONTRIBUTORS**

   - ENSURE APPROPRIATE NUMBER OF INDIVIDUAL CONTRIBUTORS - BY VARIOUS GENERIC JOB FAMILIES - HAVE BEEN IDENTIFIED.

9. FOLLOWING THE VOLUNTARY REDUCTION IN FORCE APPROVALS, DEVELOP YOUR OFFICIAL RIF LIST, GIVING APPROPRIATE CONSIDERATION TO THE PERFORMANCE/SERVICE MATRIX, CRITICAL SKILLS, HIGH POTENTIALS, RECENT NEW COLLEGE HIRE EXCLUSIONS AND PROTECTED CLASS REPRESENTATIONS.

10. SUBMIT YOUR FINAL RIF LIST TO DIVISION PERSONNEL FOR CONSOLIDATION AND MANAGEMENT REVIEW/APPROVAL.

CONFIDENTIAL

I-C

XEROX

Internal Memo

To
Personnel Directors

From
E. P. Runge

Personnel
STHQ. 1-2-D
8*344-3722

Subject
CPC Presentation
– Personnel Strategic Plan

Date
January 19, 1981

Jerry

Attached for your information is an updated version of the Personnel Strategic Plan which was sent to the members of the CPC in advance of Doug's presentation scheduled for January 25. If you have any questions, do not hesitate to call.

EPR/lh
attachment

RECEIVED
JAN 21 1981
J. L. JONES

Xerox Private Data

"Maturing/Aging Workforce in Parts of the Reprographics Business"

CONFIDENTI

STRATEGIC PLANNING FACTORS
(CONT'D)

XEROX WORKFORCE CHARACTERISTICS

- MATURING/AGING WORKFORCE IN PARTS OF THE REPROGRAPHICS BUSINESS
  - MONROE COUNTY

	AVERAGE AGE
MANUFACTURING EXEMPTS/HOURLIES	41
ENGINEERING EXEMPTS	40
VS. TOTAL U.S. OPERATIONS	36
VS T/R's	33

  - AVERAGE AGE MAY INCREASE AS A RESULT OF 1981 R.I.F./HIRING CONSTRAINTS
- WELL EDUCATED BUT TEND TO BE OVER-SPECIALIZED BY FUNCTION
- HIGH EXPECTATIONS
  - BASED ON XEROX DRAMATIC GROWTH AND MANAGEMENT PHILOSOPHY
  - SUPPORTED BY HIGH PROMOTION RATES (APPROXIMATELY 23% IN U.S. FOR 1980 AND 1981) AND HIGH PAY

SKILL REQUIREMENTS OF THE MATERIALS COST ENGINEER TO EFFECTIVELY SUPPORT NEW PROGRAMS UNDER ABSOLUTE COST CONTROL

(CONTINUED)

- AGE LEVELS IN PE AND PCE ARE A CONSTRAINT IN HANDLING NEW ROLE
  - US PE AND PCE MECHANICAL AVERAGE AGE OF 54+
  - NEW BLOOD NEEDED, PARTICULARLY IN MECHANICAL

VRIF COMMUNICATIONS GUIDELINES

TO RETIREMENT ELIGIBLE POPULATION

The intent is to make sure they understand the positive nature of what is being offered. There is a good possibility that the salary continuence bridge to retirement option may not be offered again, especially with the additional three months of pay. All employees eligible for retirement under the 10/6/82 VRIF Package should give serious consideration to their future plans in light of this option. Management, in turn, will accept and approve virtually all applications for the VRIF.

TO ALL GRADE 10's AND ABOVE

This group should understand a message similiar to the above, i.e., substantial salary continuance via the VRIF may not be offered agian. In addition, it should be made clear that the grade 10 and above population will be affected significantly by the pending RIF. Each individual should understand that there is IRIF jeopardy and that management will accept and approve virtually all applications for the VRIF.

Recommended Process:	Each senior staff manager should assemble the above populations (seperately or together) to discuss the above. At management discretion, individual "encouragement" sessions may be held. In all cases, individuals with questions or concerns should be handled by the appropriate manager or referred to Personnel.

CONFIDENTIAL

ATTACHMENT D

REPROGRAPHIC BUSINESS GROUP
REDUCTION IN FORCE
EXEMPT ANALYSIS
NOVEMBER 8, 1982
MONROE COUNTY

		PRE-RIF %	VRIF %	IRIF %	TRIF %	POST-RIF %
PERFORMANCE	3 &/OR B	29.8	57.0	80.0	64.3	28.2
	MIXED 3/4	34.2	27.9	15.0	23.8	34.7
	4 & A	36.0	15.1	5.0	11.9	37.1
		100.0	100.0	100.0	100.0	100.0
AGE	39 & B	* 51.2	7.0	*27.5	13.5	53.0
	40-49	* 34.7	34.9	*45.0	38.1	34.5 !
	50 & A	* 14.1	58.1	*27.5	48.4	12.5
		100.0	100.0	100.0	100.0	100.0
GRADE	9 & B	52.0	20.9	35.0	25.4	53.2
	10-12	33.5	60.5	57.5	59.5	32.3
	13 & A	14.5	18.6	7.5	15.1	14.5
		100.0	100.0	100.0	100.0	100.0

VRIF 86 IRIF 40

11/9/82

ATTACHMENT E

XEROX CONFIDENTIAL

XEROX

Internal Memo

RECEIVED
SEP 22 1982
D. T. KEARNS

To

D. M. Reid

From

J. J. Foley
Vice President
RMG Personnel
W105 8*222 2376

Subject

CHARLES A. LINDER
--Complaint

Date

September 16, 1982

Charles Linder was a Senior Accounting Analyst in the CMO Control/Planning organization. He is 52 years of age with 14 years of service.

He volunteered for the Voluntary Reduction In Force (VRIF) and left August 27. In his letter, he stated he was energetically advised to accept the VRIF because he was told he was vulnerable. He also felt the "Over 8 Year" rule was being replaced and we should do more for those over 50 years of age.

As you know, RMG has gone through a significant resizing to include a voluntary and involuntary Reduction In Force (RIF). The CMO Control/Planning function has been reduced from 24 to 14 since January 1, 1982. Linder was stack ranked as the lowest exempt within CMO Control and was placed on the initial Involuntary Reduction In Force (IRIF) list. He was told he would be vulnerable because he was in the Grid 2 cell ("3" performer with 14 or less years of service). In light of the depth of our cuts, Linder would have been placed on our final IRIF. Only two other Grid 2 employees were left in CMO C/P; a new college hire and a critical skill.

The VRIF for those who were 51½ years of age with 8 years of service received an additional 3 months and could take ½ pay over time to assist them in bridging to retirement. Since this was an advantage over the IRIF benefits, we did communicate to people the differences and apprised those who we felt were vulnerable. They were told, however, the IRIF list could not be finalized until we had all the VRIF's and until it was approved by both RMG and Corporate senior management.

Linder did choose the VRIF and received 15 months of salary continuation. He has taken ½ pay over 30 months and will bridge to retirement.

You know the review process we went through as well as our sensitivity to age and service combinations; however, this process was not communicated to him. Therefore, we can understand his feeling that the Over 8-Year Rule and our sensitivity to over 50's has changed. It is unfortunate that he as well as others have left either voluntarily or involuntarily; however, the magnitude of our cuts has required it.

I have attached a proposed response to Linder from D. T. Kearns. If you have questions, please let me know.

JJF:epc
attachment

cc: C. Christ
F. Pipp

ATTACHMENT F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Letter of Violation

I issue, on behalf of the Commission, the following findings as to the compliance of Xerox Corporation with the Age Discrimination in Employment Act (ADEA), as amended.

The Commission has determined that the Xerox Corporation has discriminated against individuals named, and yet to be named, in violation of Section 4(a) of the ADEA by following employment policies and practices which discriminate against salaried employees and former employees within the protected age group from 40 to 70. These policies and practices include, but are not limited to, selection of employees for termination on the basis of age.

Section 7(b) of the Act requires that before instituting any action the Commission shall attempt to eliminate the discriminatory practices alleged and to effect voluntary compliance with the requirements of the Act through informal methods of conciliation, conference, and persuasion. Section 7(e)(2) of the Act provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with §7(b). The period during which the statute of limitations is tolled, as provided in §7(e)(2), begins upon issuance of this letter.

It is the policy of the Commission to notify the persons aggrieved by the violations which are the subject of this determination of their independent right of action under the ADEA. However, we plan to withhold such action for at least 10 days in order to provide you with an opportunity to discuss this matter further. Carlton Preston, a member of my staff with whom you have already met, will be contacting you shortly to arrange a meeting to begin conciliation.

On behalf of the Commission,

James N. Finney

James N. Finney
Associate General Counsel

Date 4/19/84

Xerox Corporation
P. O. Box 1600
Stamford, Connecticut 06.
203 329-8700

Office of General Counsel

ATTACHMENT G

July 23, 1986

XEROX

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Services
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Dear Mr. Finney:

I am writing in reply to your letter of July 14, 1986, which we received on July 18, 1986. Your letter and the conclusions that you state the Commission has reached are a surprise to us and, we believe, are inconsistent with what has actually transpired in this matter.

In order to assist in clarifying our position, I believe that it would be helpful to summarize the chronology of prior events:

- In February, 1984, Xerox received from the EEOC a letter of investigation into alleged violations of ADEA. This letter requested voluminous documentary and computer data relating to the calendar years 1980 through 1983.
- In March, 1984, Xerox met with EEOC representatives to clarify the scope of the investigation being undertaken by the EEOC and to reach agreement on the data to be supplied by Xerox.
- In late March and early April, 1984, Xerox began to produce to the EEOC the agreed upon materials, including many documents and the initial set of computer tapes.
- On April 19, 1984, and before Xerox had completed its production of data, the EEOC issued a Letter of Violation under ADEA and started the statutory process of conciliation. While we were somewhat dismayed that the EEOC would issue an LOV before the EEOC had an opportunity to review the data being supplied by Xerox and to listen to our side of the case, we agreed to participate in the conciliation process and to complete the submission of data.
- Throughout the time period between May and August, 1984, there were various written and telephonic contacts between the EEOC and Xerox. Xerox completed its submission of data. There was a meeting to assist the EEOC in analyzing the computer tapes. There was one conciliation meeting at which the EEOC indicated that it had anecdotal evidence relating to the 1980-1983 time period. Xerox asked for information and offered to investigate such individual cases.

P. O. Box 1600
Stamford, Connecticut 06904
203 329-8700

Office of General Counsel

EXPRESS MAIL

XEROX

February 20, 1987

James N. Finney, Esquire
Associate General Counsel
Systemic Litigation Service
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Dear Mr. Finney:

The short answer to your letter of February 5, 1987 is that Xerox does not accept the terms of conciliation that you propound.

As we have stated time and again, Xerox has no policy of age discrimination and has engaged in no age-discriminatory pattern or practice. For that reason, we cannot agree to a general tolling of the statute of limitations nor can we agree to eradicate policies and practices "which operate to involuntarily terminate protected age group workers."

We recognize the possibility of individual incidences of discrimination given the number of managers that Xerox has and the degree to which operations are decentralized. We have expressed to you since November of 1984 our willingness to investigate individual charges, discuss them with the EEOC, and take individual corrective action where appropriate. At our last meeting, we offered to toll for six months the statute of limitations applicable to these individuals in order to facilitate the prompt resolution of their claims. You have repeatedly refused to take the first step, which is to give us a list of names.

We request one last time the names of these individuals and the opportunity to conciliate their claims. As you are well aware, some of the claims are almost four years old, and if the individuals are truly aggrieved, they have been waiting too long for redress.

I shall save for another day a recital of the many misstatements of fact and mischaracterizations concerning the long history of this proceeding that your letter contains.

Very truly yours,

Christina E. Clayton

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental Health & Safety

CEC/htl

- In September, 1984, a full day meeting was held with EEOC representatives, including yourself, at which Xerox presented information about the personnel activities in question and a statistical analysis of what actually happened. The EEOC presented its preliminary statistical analysis and provided Xerox with one Xerox memorandum about which the EEOC was concerned. This discussion was limited to the years 1980-1983. Subsequent to the meeting, Xerox provided to the EEOC an explanation of the memorandum about which the EEOC had expressed concern.

- Subsequent to the September meeting, the EEOC requested that Xerox provide the names of all persons who participated in voluntary reductions in force in the years 1980-1983. At a meeting in the EEOC's offices in November, 1984, Xerox informed you that we would not provide such names and explained why we took this position. The EEOC at that meeting agreed to provide Xerox promptly with information on approximately 100 cases in which individuals had indicated to the EEOC that they felt age had been a factor in their termination. Xerox agreed to investigate these cases and meet with the EEOC to discuss them. This was the last meeting between Xerox and the EEOC.

- In January, 1985, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. There was no further contact until January, 1986.

- In January, 1986, in a telephone conversation, the EEOC again reiterated its intention to provide Xerox with information about approximately 100 individual cases. Commission Counsel informed Xerox for the first time that these cases were "outside the Lusardi time frame, that is after March 31, 1983." The Xerox response was that this was a new subject matter which we would have to consider upon receipt of details from the EEOC. There was no further contact until receipt of your letter on July 18, 1986.

Several conclusions flow from the chronology described above:

- Xerox has never been requested to provide data, documentation or to explain its position for the years 1984, 1985 or 1986 and has not been given the opportunity to do so.

- Except for the January, 1986 telephone call, all discussions between Xerox and the EEOC have been limited to the years 1980-1983.

The basic point is that, during our conciliation proceedings covering the period 1980-1983, Xerox was never told by the EEOC until the January, 1986, telephone call that the 110 cases to which you now refer actually encompass a "post-Lusardi" time frame. Xerox has repeatedly informed the EEOC that, given sufficient information, it would investigate and address individual claims of terminations presented to it by the EEOC. We are still ready to do so with respect to the new claims you mentioned. I called your office on July 21, 1986, to set-up a meeting and am awaiting your response.

Sincerely yours,

Philip E. Smith
Assistant General Counsel
Personnel and Corporate Affairs

PES/htl

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

THE XEROX CORPORATION, a New York Corporation
Defendant.

Civil Action No.

COMPLAINT

COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451 and 1345. This is an action authorized and initiated pursuant to 29 U.S.C. 626(b) of the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. 621, et seq. (ADEA) incorporating by reference Sections 16(b) and (c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, et seq.

2. The unlawful employment practices alleged below were and are being committed within the State of New York and the in the Southern Judicial District of New York.

PARTIES

3. Plaintiff Equal Employment Opportunity Commission (EEOC) is the agency of the United States of America charged with the administration, interpretation and enforcement of the Age Discrimination in Employment Act, and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, as ratified by Public Law 98-532, effective October 19, 1984.

4. At all relevant times defendant, the Xerox Corporation and its subsidiaries (Xerox), has continuously been and is now a New York corporation, doing business in the State of New York and is now subject to the provisions of the ADEA.

5. At all relevant times defendant continuously has been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. Sections 630(b), (g) and (h).

6. Prior to the institution of this lawsuit, the EEOC's representatives attempted to eliminate the unlawful

employment practices alleged in this complaint, and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. 626(b). All statutory prerequisites to suit have been met.

STATEMENT OF CLAIMS

7. Since April 1, 1983, and continuously up to the present time, the Defendant Xerox Corporation has wilfully engaged in unlawful employment practices in violation of Section 4(a) of the Age Discrimination in Employment Act, 29 U.S.C. 623(a).

8. The Xerox Corporation has followed employment policies and practices which have illegally discriminated against its salaried employees and former employees, aged 40 to 70. The illegal policies and practices implemented by Xerox include, but are not limited to, selecting employees for termination and forced early retirement based on their age.

9. The former employees against whom Xerox has wilfully and illegally discriminated on the basis of age include, but are not limited to: William Albertson, Diego Baca, Francisco Barletta, Sarah Barnes, Joseph Bartell, Robert Barz, Jack Blankenship, James Bovitz, Dean Brady, Richard Bronson, George Brown, Sally Butler, Robert Cameron, Ronald Caselli, Floyd Caskey, Walter Cayeaux, Eraldo Chiecchi, Joseph Cometa, Reynaldo Deary, Anne Drucker, John Flahive, Herman Fleishman, David Fox, Bernard Franck, Jon Freckleton, Diane Goff, John Gosnell, Barbara Gravely, Robert Hall, Merrill Haug, Mary Elizabeth Hunter, William Karlsen, Robert Luchette, Kenneth Mrowiec, Rolando Munoz, Alphonse Oliveri, Tom Ossenford, Patrick Powers, William Previdi, Robert Rankin, John Scafetta, Charles Schubert, Joseph Simonelli, Robert Thompson, John Tortell, Ralph Tuzi, Anthony Vito, William Watkins, and Robert Weiler.

10. The effect of the policies and practices complained of in paragraph 8. above has been to deprive illegally its employees and former employees, including those named in paragraph 10., of equal employment opportunities and otherwise adversely affect their status as employees because of their age.

11. A judgment restraining violations of the ADEA and requiring the retroactive making whole of employees who have suffered as a result of age discrimination is specifically authorized by 29 U.S.C. 626(b) and 29 U.S.C. 217.

PRAYER FOR RELIEF

12. WHEREFORE, The EEOC respectfully prays that this Court:

A. Find that the Xerox Corporation has violated the ADEA following policies and practices which discriminate against its employees in selecting them for termination and forced early retirement on the basis of their age;

B. Grant a permanent injunction restraining Xerox Xerox, its officers, agents, successors, and all persons acting in concert with it, from engaging in any employment practice which discriminates because of age;

C. Order Xerox to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for persons who are forty years of age or more, and which eradicate the effects of its past and present unlawful employment practices;

D. Grant a judgment requiring Xerox to pay appropriate back pay and an equal sum as liquidated damages, in amounts to be proved at trial, to persons adversely affected by the unlawful employment practices described herein, namely the persons listed in paragraph 9. above;

E. Order Xerox to make whole those persons listed in paragraph 9, and all other persons adversely affected by the unlawful employment practices described herein, by making contributions to retirement benefits and insurance benefits, by reinstating employees, and by other appropriate injunctive relief necessary to eradicate the effects of its unlawful employment practices.

F. Grant such other relief which the Court deems proper under the circumstances; and

G. Award the EEOC its costs of this action.

JURY TRIAL DEMAND

The EEOC requests a jury trial on all questions of fact raised by its complaint.

Respectfully submitted,

JOHNNY J. BUTLER
General Counsel (Acting)

JAMES N. FINNEY
Associate General Counsel

LEROY T. JENKINS, JR.
Assistant General Counsel

KAREN H. BAKER
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20507
202/634-6003

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 11, 1987

TO : James N. Finney
Associate General Counsel

THRU : Leroy T. Jenkins, Jr.
Assistant General Counsel

FROM : Judith L. Mathis
Trial Attorney

SUBJECT : Xerox-- Answers to Anticipated Questions

This memo is in response to your memo of February 18, 1987, in which you raise some questions we should anticipate. Following, by order of question, are the answers as best we know them:

1. Relevant years under focus

Causes of action arose from 5/83 to 11/84 (35 of the 48 potential plaintiffs were terminated in 1983)

Xerox practices and employment strategies since 1980 are highly relevant

2. Size of workforce at beginning of process and currently; number of facilities

We have computer data for employees on the Xerox Personnel Data System which does not include several subsidiaries. In 1984, Xerox represented that there were 44,000 employees on the PDS, while 17,000 more were employed by subsidiaries. At the end of 1983, the PDS shows about 41,000 employees, a drop of 3000 employees. We have no reliable way to check the current workforce and be certain we are measuring only the units on the PDS.

Although there are perhaps 3000 fewer employees, this number is insignificant in light of the huge number of employees which could fluctuate at any moment of count by that amount for many reasons. During the period at issue, Xerox could hardly claim that it truly achieved a reduction in force when it hired 24,000 new employees while RIFFing about 4500.

Xerox has hundreds of facilities around the country. The facil ties involved in our case are concentrated in Webster, New York Southern California, and Dallas, Texas. The Xerox definition of facility can include several different builings which may be spread over a large square mile radius. Our case would probabl involve a maximum of 15 facilities.

3. Where jobs were lost and where they re-emerged

Don Reisler's analysis led him to suspect that Xerox managers hid people by giving them a different computer coding. He was unable to track specific groups or to check out this suspicion, though this is an analysis we would perform during litigation. If this is true, it would be very persuasive evidence of wilfullness.

We know that jobs were lost in engineering in the Webster, New York facilities, although new college graduates were hired throughout the period at issue. The jobs being filled were essentially the same jobs as those held by the engineers who were RIF'd. The nature of Xerox research and manufacturing is to constantly organize and reorganize small units within one division or facility.

Xerox has orally defended its continued hiring and its retention of new college graduates on the basis of its need for "critical skills" and general statements about "technological obsolescence Our investigation has produced evidence (testimony by managers and memos) that Xerox has a written policy to retrain employees whose jobs change or whose expertise has become obsolescent. In reality, however, part of the job of engineers employed by Xerox was to stay current with developing technology and their experience with the company would better prepare them for the development of new products than a new college degree in engineering.

One of the criteria in the decision to RIF was the employee's "potential for growth." According to a former personnel manager, this potential was to be greatest for the youngest employee Employees who were performing well but had been there a long time were to be judged as having little growth potential.

Our evidence indicates that sales jobs were not reduced to any significant extent and that new hires were filling exactly the same jobs that terminated employees were leaving.

4. The number of individuals complaining of age discrimination

   There are 1350 plaintiffs in the private lawsuit. About 800 of those plaintiffs were RIF'd, which is approximately 18% of the total employees over 40 who were RIF'd.

   We have had a response from 50 of the 110 persons to whom we sent questionnaires. As you recall, these 110 people came to our attention because they tried to opt into the Lusardi suit. We have not sought complainants or prospective plaintiffs in any way. We believe that if we file a lawsuit, the subsequent notice procedure would produce a response of about 200 people.

5. Number and percentage who were voluntary and involuntary

   Of the 50 prospective plaintiffs we represent, 14 left in what Xerox termed a VRIF, although they allege that they were told they would be involuntarily terminated if they did not chose the VRIF. The IRIFs total 27 people and 9 people were fired.

   For the years 1980 through 1983, a total of 1868 people were IRIF'd, of whom 46% were over 40. The VRIFs totaled 2580, of whom 68% were over 40.

   For 1983 alone, 290 people were IRIF'd, of whom 55% were over 40. There were 269 VRIF's, of whom 77% were over 40.

6. The expert's report has been provided. His findings and analysis are summarized and capsulated throughout the PM and relevant memoranda.

7. Our theory of violation / Xerox's theory of defense

   Our evidence shows that Xerox developed a deliberate strategy to eliminate its older, higher paid workers through programs termed both voluntary and involuntary. The actions by Xerox, directed from the corporate level and implemented by mid-level managers, constitute a wilfull violation of the ADEA. Employees over 40 were illegally forced to take what Xerox called VRIFs and were also involuntarily RIF'd, while younger employees were treated more favorably and while Xerox was constantly hiring younger employees.

   Xerox has never rebutted our evidence of wilfull violations of the ADEA. Its defense consists of the assertion that VRIFs were truly voluntary and that IRIFs were chosen by objective criteria. Xerox contends that economic considerations made massive reductions in force necessary and that older employees were not treated any differently. Xerox has not offered any explanation of its continued hiring or of the memos circulated at corporate levels which describe the plan to get rid of older workers.

8. Nature and content of voluntary and involuntary offers

   My memo of March 10 compares voluntary with involuntary benefits and the Bridge to Retirement with continued employment. Any notion that the Bridge to Retirement was attractive is an inaccurate perception deliberately created by Xerox. It could have been attractive only as an alternative to IRIF or if the employee got another job making the same amount of money he made at Xerox. When those who took the Bridge to Retirement reached 55, their retirement benefits were frozen at a level about one third of what they would have been at 65. Even if the employee got another job, his opportunity to vest in another plan and accumulate much in a retirement account is diminished.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FEB 18 1987

MEMORANDUM

TO: Leroy T. Jenkins, Jr.
Assistant General Counsel

FROM: James N. Finney JNF
Associate General Counsel

SUBJECT: Xerox Presentation (litigation recommendation)

The following are some of the questions we can expect to encounter in presenting the litigation recommendation in the Xerox matter. The general premise is that the employer was faced with a need to adjust the size of the workforce downward. This may have resulted in the elimination of certain jobs, or the merging of elements of certain jobs to produce jobs with different substantive context.

1. The relevant years under focus?

2. The size of the workforce at the beginning of the process, and the size of the workforce currently. How many facilities are there? How many were involved?

3. Pinpoint, if we can, where jobs were lost; and where they re-emerged. Also state, to the extent that we know, whether the re-emerged jobs were/are substantially different, or, for the most part, essentially the same jobs but with different titles.

4. The number of individuals who are complaining of age discrimination. Include and identify the numbers of such individuals in the private lawsuit, as well as the number who are being represented by the Commission.

5. The number and percentage who were "voluntary", and those who were "involuntary". PAG – [illegible] v. [illegible] VG.

6. Capsulate the expert's opinion and have a copy of his report ready to be submitted if asked for.

7. A clear and concise statement of our theory of violation, and Xerox's theory of defense.

8. We will need to describe the nature and content of the offer to elect "voluntary" retirement--and "involuntary" retirement. There is a notion that this former was very attractive. We have maintained that there was more than an element of "arm twisting" in this process. We need to describe what that was, and how it worked. It is my impression that the most persuasive case we can expect to be able to make, if at all, should involve repeated situations where--after the offers and elections were made and taken, jobs which were said to be slated for elimination, in fact, continued, or reappeared, with non-protected age group personnel--and in roughly the same general geographic location.

The above are some of the points covered in our meeting. I may think of others before we are ready to present this to the Commission. This is also in addition to those other issues which you were going to handle.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

MAR 1 3 1987

MEMORANDUM

PURPOSE: ACTION

TO : Clarence Thomas
Chairman

R. Gaull Silberman
Vice-Chairman

Tony E. Gallegos
Commissioner

Fred W. Alvarez
Commissioner

FROM : William H. Ng
Deputy General Counsel

SUBJECT : Litigation Recommendation for Intervention in Cipriano v. Board of Education of the City School District of the City of North Tonawanda, No. 84-CV-80C (W.D.N.Y.)

Attached please find copies of a recommendation for intervention in the above-styled case which has been sent to the Executive Secretariat. Due to the importance of the issue involved, we have requested that this case be placed on the first available Commission agenda, rather than be processed through the special notation vote procedure. We would like to present briefings on this matter to you and your staff prior to consideration of the recommendation at a Commission meeting. Included in the attached package are copies of the court of appeals and district court decisions which have been issued in the case to date.

Also included in the package is a memorandum of the Office of Legal Counsel addressing an earlier draft version of this litigation recommendation. Portions of the litigation recommendation have been revised or rearranged since the Legal Counsel memorandum was written, and we have added to the recommendation a brief discussion of §4(i) of the ADEA and of the advisability of appearing in an amicus, as opposed to intervenor, capacity. *See* Recommendation for Intervention at 5 n. 6 and 6 n. 7. Also, the Legal Counsel memorandum at p.2 quotes from the litigation recommendation draft. The quoted material now appears in the final Recommendation for Intervention at 27 n. 18.

I will be contacting your office to schedule a briefing in this case.

Attachments

1. Litigation Recommendation
2. Court of Appeals' Opinion
3. District Court Opinion
4. Legal Counsel Memorandum

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

13 MAR 1987

MEMORANDUM **PURPOSE: ACTION**

TO: CLARENCE THOMAS
Chairman

R. GAULL SILBERMAN
Vice-Chairman

TONY E. GALLEGOS
Commissioner

FRED W. ALVAREZ
Commissioner

FROM: WILLIAM H. NG
Deputy General Counsel

SUBJECT: Recommendation for Intervention in *Cipriano* v. *Board of Education of the City School District of the City of North Tonawanda*, No. 84-CV-80C (W.D.N.Y.)

INTRODUCTION AND SUMMARY

The issue in this case is whether the North Tonawanda School Board and teachers' union violate the Age Discrimination in Employment Act (ADEA) by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Second Circuit Court of Appeals last year reversed the entry of judgment for the School Board and remanded the case for further proceedings. *Cipriano* v. *Board of Education of the City School District of the City of North Tonawanda*, 785 F.2d 51 (2d Cir. 1986). 1/

The appellate court ruled, in the absence of any dispute, that the plan violated §4(a)(1) 2/ of the Act, 29 U.S.C. 623 (a)(1), because it withheld an employment-related benefit on the basis of age (785 F.2d at 53). On the question of whether the plan was protected under §4(f)(2), 3/ 29 U.S.C.

1/ Copies of the district court and appellate court opinions are attached.

2/ Section 4(a)(1) provides that:

> It shall be unlawful for an employer
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.

3/ Under §4(f)(2):

> It shall not be unlawful for an employer. . . or labor organization -
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act. . . .

623 (f)(2), the court ruled that the plan was "bona fide" and that it was the type of "employee benefit plan" which §4(f)(2) shelters. The only issue to be decided by the lower court on remand is whether the School Board can additionally prove, as is required under §4(f)(2), that the plan is not a subterfuge to evade the purposes of the ADEA. On this issue, the Second Circuit directed the district court to "seek the assistance of the EEOC" with respect to the meaning of "subterfuge" in §4(f)(2) as amended, or with respect to "the permissible means of structuring voluntary retirement plans." 785 F.2d at 59.

We advised you earlier that the district court, in accordance with the Second Circuit's mandate, requested the Commission to participate in the proceedings on remand. The court has now made clear that it wishes our participation to take the form of intervention, and is awaiting our response. In light of the fact that both the Second Circuit and the district court have specifically requested the Commission's assistance and in light of EEOC's role as interpreter and enforcer of the Age Act, we are recommending intervention 4/ under Fed. R. Civ. P. 24(b)(2) and have prepared this memorandum setting forth the arguments which should be made to the court.

Based upon our review of the law, the ADEA legislative history and the administrative interpretations which are still in effect, we recommend that the Commission's brief present the following analysis. First, genuinely voluntary, early retirement incentives may peacefully coexist with the

---

4/ Trial Services recommended against litigation challenging the North Tonawanda Plan in December 1985, before the case went up on appeal. That recommendation was based on the assumption that the legal issues were similar to those in another case, Chappaqua Central School District, which Trial Services had advised against litigating. In Chappaqua, the challenged incentive bonus gradually decreased until there was a cut off at age 62, when the employees became eligible for Social Security, and Trial Services believed that the respondents might be able to prove an age-related cost justification for the discrimination. In this case, however, we do not believe that the denial of the incentive payment to persons over the age of sixty could be based on cost considerations because this is an absolute cutoff of payments at age 61 without the graduated reductions which could arguably tend to support a cost justification defense. Moreover, since the Second Circuit's decision in Cipriano indicates that courts are uncertain whether employers must provide any age-related cost justification for withholding equal benefits from older workers on the basis of age, we believe that this is an additional reason for considering intervention in this case.

ADEA. Under established Supreme Court precedent, an incentive plan is in prima facie violation of §4(a)(1) only where, as here, it is structured in such a way as to deprive older workers of the incentive benefit on the basis of their age. However, there are various types of incentives --e.g., a lump sum to all retirement-eligible employees irrespective of age, or devices that make younger employees eligible for pension benefits--which do not collide with §4(a)(1) at all.

Second, plans that do provide unequal benefits because of age are immunized from attack by virtue of §4(f)(2) only where the cost of providing the benefit increases directly as a function of age. Thus, we believe that the legislative history clearly supports the view that Congress considered plans paying unequal benefits to be a "subterfuge to evade the purposes of the [ADEA]," within the meaning of §4(f)(2), unless the cost of providing the benefit increased with age. This conclusion necessarily follows from the longstanding interpretation of §4(f)(2) set forth in the regulations promulgated by Department of Labor in 1969 and ratified by the Congress in 1978, 1982 and 1986.[5] It is also the position that the Office of General Counsel has consistently advocated before the courts of appeals. See briefs in EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); EEOC v. Westinghouse, 725 F.2d 21 (3rd Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 92 (1984); EEOC v. Cargill, No. 84-2692 (10th Cir. filed May 31, 1985); Betts v. Hamilton County, et al., No. 86-3676 (6th Cir., filed Jan. 6, 1987); EEOC v. State of Maine, No. 86-2022 (1st Cir. filed Jan. 30, 1987).

Applying this principle here, we conclude that the School Board will probably be unable to prove that its incentive plan is justified by age-related cost considerations. Withholding a fixed incentive bonus from employees beyond age 60 cannot be justified on the ground that the employees' age renders extension of the incentive to them more costly. Such a plan, therefore, reduces to a "subterfuge" because, without any apparent cost justification, it denies them a benefit and also because it operates to induce employees to exit the work force before they reach age 61, in contravention of the ADEA's goals.

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[5] Those regulations, which the Commission has continued in effect, have always provided that differential benefits are lawful only where the employer proves that the disparity is justified by age related cost considerations. 29 C.F.R. 860. 120(d).

Although the court of appeals held that the plan in this case violated §4(a)(1), we explicate the analysis of that section here as a framework for discussing the fact that not all incentive plans violate §4(a)(1). The memorandum then discusses the separate elements of the §4(f)(2) defense. 6/ The brief in intervention will necessarily be narrowly focussed inasmuch as the Second Circuit has already ruled that the School Board's plan violates §4(a)(1), and that it is a "bona fide employee benefit plan" within the meaning of §4(f)(2). Those rulings, as the law of the case, are now binding upon the district court, and we would consequently not present any extensive arguments on those issues to the district court. 7/

BACKGROUND

Facts

Two former teachers in the North Tonawanda school system brought this ADEA action against the School Board and their union alleging that, because of their age, they were discriminatorily denied an employment-related benefit which was given to younger workers. Specifically, they challenged a provision of the 1980 collective bargaining agreement which offered a choice of two benefits to teachers age 55 to 60 who had completed 20 years of service and who agreed to retire between July 1 and February 1, in any of the three years (1980-83) covered by the agreement: (A) paid-up medical insurance premiums to age 65, plus $2000, plus $50 for each year of service beyond 20 years, or (B) a

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6/ This memorandum pertains only to the issue raised by the particular facts of the North Tonawanda incentive and does not purport to broadly settle the issues which may arise in other incentive cases. The Commission may wish to consider further regulatory guidance in the area although Legal Counsel suggests that regulations may be inappropriate because §4(i) of the ADEA, added last year to require continued benefit accruals for employers who work beyond normal retirement age, may cover the issue of early retirement incentives. We think that the assumption about §4(i)'s reach is not clear and deserves further analysis, but, of course, any proposed regulation could consider any potential impact of §4(i).

7/ Legal Counsel has suggested that it may be better to participate as amicus so that we are not bound by the law of the case. However, the district court is so bound and it is required to decide this case within the framework and directions set forth by the Court of Appeals. Presenting opinions on issues decided by the Second Circuit would not assist the district court in deciding this case.

lump sum of $10,000. Plaintiffs were 61 years old on July 1, 1980, and were thus ineligible for this early retirement incentive plan by its terms. They retired the following year, on June 30, 1981, and later brought this suit to recover the $10,000 they would have received under Option B if the incentive plan had applied to them at the time of their retirement.

Although not in evidence below, we understand and it is undisputed that the incentive was first offered to all pension-eligible teachers, regardless of age, in a previous collective bargaining agreement effective January 1979 to June 1980. However, teachers over age 60 had nine months (to September 30, 1979) within which to elect early retirement, while younger teachers had eighteen months (to June 30, 1980) to exercise the option. In any event, the plaintiffs, who were 60 years old at the time, chose not to participate in this first incentive program. We understand that the plan remains in effect.

District Court Opinion

The district court sua sponte entered summary judgment for defendants under §4(f)(2) after directing them to submit only a copy of the 1980 bargaining agreement together with affidavits that the copy was authentic. Plaintiffs were limited to contesting authenticity, if they could.

The court held that the requirements of §4(f)(2) were satisfied because it was undisputed that defendants were "observing the terms" of their early retirement incentive plan and because, the court concluded, the plan was "bona fide" within the meaning of §4(f)(2). It supported that conclusion with findings that the plan was voluntary and that it had not forced plaintiffs to retire. The court further found "nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act." Finally, after citing to Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), but not to any ADEA legislative history, the court stated that the plan was consistent with what Congress "meant to" do in enacting the statute, viz., to prevent forced discharge of older individuals while preserving early retirement incentives as "useful and necessary devices which employers can use to manage their work forces."

Court of Appeals Opinion

Because of the limitations which the district court had imposed on the submission of evidence, the court of appeals treated the district court's decision as a grant of a motion to dismiss for failure to state a claim upon which relief can be granted. 785 F.2d at 53. It initially ruled, in the absence of any dispute, that the incentive plan violated §4(a)(1)'s prohibition against age-based discrimination in "compensation, terms, conditions or privileges of employment." 785 F.2d at 53-4. It then considered whether the §4(f)(2) exception applied.

First, it concluded that the incentive plan was a "bona fide employment benefit plan" within the meaning of §4(f)(2) because it paid substantial benefits to employees covered by it and should be "read as a supplement to [the] underlying general retirement plan for the purposes of §4(f)(2)." 785 F.2d at 54. The court reasoned that, because the special incentive simply increased retirement compensation and, "like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan." 785 F.2d at 56. The court pointed to Patterson v. Independent School District #709, 742 F.2d 465, as support for its holding, noting that Patterson had upheld an early retirement incentive under §4(f)(2) on the ground that it merely encouraged employees to activate the general pension plan, which was admittedly lawful, at an earlier age. 785 F.2d at 55.

In holding that the incentive plan was "a bona fide employee benefit plan," the court rejected plaintiffs' argument that §4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1), to include within §4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan -- e.g., whether it offered a lump sum benefit before age 60 or one that tapered off by 60 -- goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

The court then turned to the question of whether the plan was a subterfuge to evade the purposes of the Act. Noting that defendants bear the burden of proof on this issue, it held that these defendants had not sufficiently discharged that burden to justify dismissal without trial. However, the court professed uncertainty as to the nature of the proof §4(f)(2) requires in this context.

It pointed out that the "subterfuge" proviso historically has been litigated only in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option." 785 F.2d at 58. Nonetheless, it recognized that Congress in its 1978 ADEA amendments banning mandatory retirement left the "subterfuge" language in the statute, thereby requiring employers to show something more than that challenged benefit plans are bona fide. For this reason, and in light of the Department of Labor's §4(f)(2) interpretation (29 C.F.R. §860.120(a)(1)) requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations, the court held at minimum that the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 58. The court opined, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59. It remanded the case to allow the district court, with EEOC's assistance, as either amicus curiae or intervenor, to consider in the first instance the nature of proof which will discharge defendants' burden of proving the absence of subterfuge in cases such as this.

DISCUSSION

I. Preliminary Observations

While Congress has made quite clear that mandatory early retirement is unlawful (see §4(f)(2), 29 U.S.C. 623(f)(2)), it is equally clear that Congress has not prohibited employees from voluntarily choosing early retirement. Instead, a primary goal of the ADEA is "to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." 118 Cong. Rec. 7745 (1972), reprinted in ADEA Leg. Hist. at 205 (Remarks of Sen. Bentsen in introducing an amendment to extend the protection of the ADEA to government employees, quoting Report of the White House Council on Aging). Truly voluntary early retirement incentives facilitate that choice by allowing some employees to retire comfortably and to pursue neglected professional or personal interests. In addition, they enable an employer to reduce or modify its work force, when necessary, in a way that seems more humane than to impose widespread layoffs.

There may, however, be drawbacks to early retirement incentives. Such plans tend to exacerbate the expectation of earlier and earlier retirement. In 1948, 89.5% of men over 65 were in the civilian labor force, compared with 17.4% in 1983. "Mixed Bag, As Early Retirement Grows in Popularity, Some Have Misgivings," Wall St. J., April 24, 1984. With an increasingly aging population, many people will have to work until age 65 or 70 in order to maintain supplies of skilled workers and to keep the Social Security system solvent. Ibid. Moreover, incentive plans often are more costly to the employers than anticipated. Ibid. Employees, too, may suffer in that increasing life expectancy and inflation may erode the early retirement income which seems adequate initially.

Finally, whether such a retirement is actually voluntary, in any meaningful sense, is an ever present issue in many incentive cases. "Incentive" plans are generally offered in a climate of economic uncertainty. Employees may believe--often with some reason--that their choice is not between early retirement and work, but between early retirement and layoff. See Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986)(plaintiffs alleged constructive discharge on the ground that they elected early retirement because they believed their only alternative was layoff and the employer failed to disabuse them of their misimpression).

The issue here is not whether incentives per se violate the Act. They do not. Rather, in the litigation context, the sole question is whether or not the specific plan at issue is structured so that it meets the requirements set down by Congress in the ADEA by providing equal benefits regardless of age or, if not, that it falls within the 4(f)(2) exemption. It is to these issues that we now turn.

II. The Application of §4(a)(1) to Early Retirement Incentives

1. As noted above at page 8, the court of appeals ruled that the North Tonawanda incentive violated §4(a)(1)'s prohibition against discrimination on the basis of age "with respect to an individual's compensation, terms, conditions or privileges of employment." That conclusion is final~~ly~~ firmly supported by Supreme Court precedent establishing that employers run afoul of §4(a)(1) if they subject older workers to treatment which, "but for" the employees' age, would be different. Trans World Airlines v. Thurston and EEOC, 469 U.S. 111, 120 (1985). Accord EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984); Geller v. Markham, 635 F.2d 1027, 1035 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981). Cf. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (§703(a)(1) violated where female employee provided different periodic retirement benefits "because of sex"); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(same).

The Commission argued in Thurston that while the Act does not compel an employer to provide any particular benefits, the benefits that it chooses to provide cannot be withheld from older employees because of age. The Supreme Court agreed. Thurston, 469 U.S. at 121, citing Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)("benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free. . . .not to provide the benefit at all"). This is true whether or not participation in the plan is voluntary, because the Supreme Court has held that "the opportunity to participate in [an employee benefit] plan constitutes a 'condition[] or privilege[] of employment,' and that retirement benefits constitute a form of 'compensation.'" Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983) (emphasis added; citations and footnotes omitted). Section 4(a)(1), like §703(a)(1) of Title VII, 8/ "forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id. at 1081-82 n.10. Accordingly, an incentive plan which makes age-based distinctions in the amount of the benefit offered violates §4(a)(1) on its face. 9/ Thus, the first

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8/ Section 4(a)(1) was derived in haec verba from §703(a)(1). Lorillard v. Pons, 434 U.S. 575, 577 (1978).

9/ It is not a defense to such a discriminatory practice that the employer lacks bias or animus towards older workers. The legislative history of the ADEA indicates that Congress recognized that most age discrimination was not due to discriminatory animus but to "the ruthless play of wholly impersonal forces." The Older American Worker -- Age Discrimination in Employment, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 at 3 (1965)("§715 Report"). The Secretary concluded his report with a recommendation for "[a]ction to adjust institutional arrangements which work to the disadvantage of older workers." Id. at 20. Indeed it is settled that the only issue under 4(a)(1) is whether the benefit differential is because of age; it is irrelevant that the employer's motive may be benign. Cf. Geller v. Markham, 635 F.2d at 1034 (where cost savings are related to age, refusal to hire for those reasons violates ADEA); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983)(under ADEA, economic savings not a legitimate justification for selecting older employees for discharge); Franci v. Avco Corp., 538 F.Supp. 250 (D. Conn. 1982) (layoff of highly paid older workers to save money violates ADEA). See also, City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 716-17 (Title VII does not permit a "cost justification" defense).

It is not enough to allege that the employer is motivated by a desire to save money. An employer could save money by paying older workers a lower annual wage than younger workers were it not for the ADEA. See 29 C.F.R. §1625.9 and cases cited supra. As Representative Hawkins explained in discussing pregnancy discrimination:

> eradicating invidious discrimination costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or Title VII. . . .

Introductory remarks of Mr. Hawkins on H.R. 6075, 123 Cong. Rec. 10583 (1977) reprinted in, Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, 26 (Comm. Print 1980).

question in incentive cases is whether the challenged plan offers unequal benefits to employees on account of their ages.

2. a. The North Tonawanda defendants conceded that their plan violates §4(a)(1). The plan provides for a substantial financial benefit ($10,000, or cash plus health insurance premiums) to be paid to employees age 55 to 60 who are otherwise eligible for early retirement and who volunteer to leave the work force. After employees reach the age of 61 they are deprived of that benefit. Thus, employees age 61 and over are treated differently from similarly-situated younger employees because of their age and the plan on its face violates §4(a)(1) because, "but for" their age, retirement eligible employees over age 60 would be entitled to the incentive when they retired. 10/

b. Defendants have asserted, however, that it somehow makes a difference that all employees, including plaintiffs, had a right to take the incentive if they retired by June 30, 1980. (See supra at 7). Although the terms of this "window" provision were not in the record before the Second Circuit, the court held that any such "window" was immaterial to defendants' §4(a)(1) liability because "[plaintiffs'] claim [was] not that they were denied the opportunity ever to participate in the incentive plan, but that they were denied the opportunity on the date they ultimately chose to retire." 785 F.2d at n.2. Thus, it is the law of the case, binding on the district court, that the fact that employees once had the option of taking the incentive is not a defense.

We think the court's analysis consistent with the terms of §4(a)(1). The issue under §4(a)(1) is whether at some discrete point in time the employer is treating some employees differently on the basis of their age. Here, when plaintiffs wanted to and were able to retire in June 1981, people over age 60 were denied a benefit that was available to younger people.

10/ There can be no argument here that the plan does provide equal benefits and that the incentive merely compensates younger workers for the benefit reductions that usually accompany early retirement (see discussion infra at 19-23). In New York normal retirement age is 60; the 60 year old, therefore, gets full benefits plus $10,000 while the 61 year old gets only the retirement benefits.

Moreover, defendants cannot argue that, because each employee at one time had the opportunity to participate by virtue of the window, they provided that same benefit of employment to older and younger workers. First, those over age 60 at the time the incentive was first offered had half the time offered younger people in which to elect retirement, which is a major life decision. Furthermore, when the retirement, incentive was reoffered, they were excluded. (See supra at 6-7). At any point in time (except for the initial nine months), employees aged 55 to 60 had available a benefit which those aged 61 and over did not.

To reason that an employer avoids violating §4(a)(1) by providing a short "window" of opportunity in which all employees can exercise the option but where older employees have in effect less time to choose the option is, in our view, no different than the claim that an employer could avoid liability for sex discrimination, for example, by giving women nine months after hire in which to opt into a deferred savings plan while allowing male employees to opt in at any time. Cf. Arizona Governing Committee v. Norris, 463 U.S. at 1081-82, n.10 (an employer cannot immunize itself from liability for providing a discriminatory benefit option simply by providing other nondiscriminatory options). 11/

11/ Two Eighth Circuit cases, IBEW, Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985) and Patterson v. Independent School District #709, 742 F.2d 465, 468 (8th Cir. 1984), might be cited for the proposition that §4(a)(1) is not violated whenever a window of opportunity has been provided. The Second Circuit has foreclosed that result in this case.

Moreover, those cases are distinguishable. In IBEW, the court, held that the employer did not violate the ADEA by offering a life insurance plan to all employees upon employment, but afterward only to those under age 40. Although the decision appears to be based partially on §4(a)(1) and the fact that all employees at one time had an option to join, the bulk of the court's decision suggests that it thought the employer could show an age-related cost justification for the plan, and, thus, qualify for §4(f)(2)'s exemption. To the extent that the court thought that §4(a)(1) was not violated if the older employees were ever given an option, we believe that it erred for the reasons discussed above.

In Patterson, the court opined that an older worker who had passed beyond the age at which the retirement incentive was available had no claim because he was no different than a person who retired before the enactment of social security and was, therefore, unable to claim Social Security benefits. The court's hypothetical concerned a person who has already left the work force, however. Under the ADEA, an employer is required to provide all present employees with equal benefits (subject to the narrow §4(f)(2) exception which we discuss below). Thus, the employees over age 60 are entitled under §4(a)(1) to the same bonus for retiring which the employer chose to give to the 55 to 60 years old group.

3. Although North Tonawanda's plan violates §4(a)(1), incentive plans can be, and frequently are, structured so that they do not. The court's request for suggestions as to lawful means of structuring incentives can probably best be answered by providing a few examples of such plans already in use which actually provide equal benefits. The ensuing discussion is certainly not intended to be an exhaustive recitation of specific plans, but rather provides some broad prototypes which do not violate §4(a)(1). Thus, to recognize that some incentive plans violate the Act is by no means to call into question the legality of incentives generally, or to unreasonably restrict employer options.

First, the employer could simply offer an incentive similar to those offered here -- a lump sum or cash times years of service and/or paid up insurance premiums -- if it were offered to all retirement eligible employees regardless of age and under the same condition. For example, the International Longshoreman's Association and Port of Baltimore Management Officials have offered all longshoremen with 25 years of service a lump sum. "Dockworkers to Get Deal to Retire," Washington Post, Dec. 19, 1986.

Another typical and inoffensive retirement incentive involves lowering the age at which actuarially unreduced benefits are available in a defined benefit plan. A commonly used formula for determining benefits is [final average salary] x [a fraction of salary (usually at least 1.5%)] x [years of service] x [1 (at normal retirement age; typically 65)]. Under such plans employees can usually retire a few years before normal retirement age but the final factor of [1] will be reduced for each year short of normal retirement age, so that if one retires at age 55, the formula will be something like: [final salary] x [a percentage (1.5%)] x [years of service] x [.363]. In order to encourage early retirement, employers may offer to drop the actuarial reduction for all those otherwise eligible for early retirement. In this way, the employer is not providing unequal benefits on the basis of age. Rather, each retirement eligible employee's pension will be calculated on the basis of salary and years of service. Thus a 65 year old employee with a $40,000 final annual salary and 20 years of service will receive the same periodic pension benefit as a 55 year old with the same pay and years of service.

It may be argued that removing the actuarial reduction for the younger worker leads to unequal benefits because the actuarial value of the benefit will be greater for younger employees as a group than for the older employees as a group. The focus of §4(a)(1), however, like its Title VII counterpart (§703(a)(1), 42 U.S.C. 2000e-2(a)(1)), is on the individual, not on the group. *Arizona Governing Committee* v. *Norris*, 463 U.S. at 1073 (1983); *Connecticut* v. *Teal*, 457 U.S. 440, 453-54 (1982); *City of Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. at 708 (1979). Hence, actuarial predictions of value -- even though they may be accurate for the group -- are not pertinent to whether §4(a)(1) is violated. *Manhart*, 432 U.S. at 710 n.20 (impact on group irrelevant, retiree's total pension benefit depends on his or her *actual life span*) (emphasis in original). Rather, the question is whether each employee receives equal ascertainable benefits irrespective of age. 12/ Thus, if all eligible employees receive equal monthly benefits for life, 13/ they are not being treated differently because of age. *See id*. at 711-12. *Cf*. *Dorsch* v. *L.B. Foster Co*., 782 F.2d 1421, 1427 (7th Cir. 1986) (employer did not violate §4(a)(1) where its early retirement plan gave equal monthly benefits to every employee whose age and years of service totalled 75, even though the total benefit was larger for younger than older employees because younger employees drew

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12/ For this reason, we believe that it would be incorrect to argue that §4(a)(1) is not violated because the incentive is a salary replacement (*see Britt* v. *E. I. DuPont de Nemours & Co*., 768 F.2d 593 (4th Cir. 1985), which should be greater for younger workers who are potentially foregoing greater future earnings. The future work pattern of any individual is entirely speculative. *Manhart* and *Norris* make clear that projections about the probable life or working life of the group cannot justify unequal benefits under §4(a)(1). We note, too, that *Britt* itself does not purport to support any such argument. It held only that the employer did not violate §4(a)(1) when it declined to allow employees to draw the incentive and retirement benefits simultaneously. See further discussion *infra* at 38-9.

13/ By "equal benefits" we are referring to an equal fraction of salary times years of service. The same analysis would apply to incentive plans for which the underlying retirement plan prescribes a fixed monthly amount for all employees of a given age and length of service. If the employer simply lowers the age at which the benefit is available, §4(a)(1) is not violated.

the benefit for a longer period of time). 14/ In short, where the incentive merely amends the underlying benefit plan so that all retirees receive an equal periodic benefit for life, it does not violate §4(a)(1). 15/

A third incentive used by several employers is to give extra age and service credits -- frequently five years -- to each employee. Because virtually all plans have a minimum age and service requirement for pension eligibility, this will increase the number of employees eligible for retirement. It will also make some employees eligible for actuarially unreduced benefits; for example, if normal retirement age is 65, a 60 year old will be able to get actuarially unreduced benefits. Finally, in the typical defined benefit plan, described above, in which years of service are part of the

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14/ We caution, however that we think the *Dorsch* court's analysis is flawed. There the employer offered $600 per month to eligible employees until they reached age 62. The case did not involve a lifetime annuity which would have made the total value of the benefit to any individual unascertainable. Instead, because of the age 62 cutoff, the total value of the benefit to any given individual could be determined and the older individual would clearly receive a smaller benefit. Thus, the *Dorsch* court probably erred in finding no violation of §4(a)(1). *See also*, *Potenze* v. *New York Shipping Ass.*, 804 F.2d 235 (2nd Cir. 1986)(a plan which make distinctions among recipients on the basis of age violates section 4(a)(1)).

Nevertheless, in stressing the importance of periodic rather than total value, we think the court may have implicitly recognized that the periodic benefit is the appropriate comparison when the total value to the individual is ascertainable only by reference to actuarial assumptions, as in *Norris* and *Manhart*.

15/ It might be argued that incentives by definition give something extra to younger workers that the older employees have already earned -- here, for example, a vested interest in a pension benefit of a certain amount. We disagree. Employers can always extend a benefit to larger groups of employees without having discriminated against those who already have the benefit. For example, if an employer offered college tuition to all management trainees with eight years of service and later extended the benefit to all management trainees, we do not think there is a serious argument that the value of the benefit to the trainees who already have eight years service has been diminished.

Furthermore, such an argument seems to assume that pension benefits are purely a reward for service. They are not. They are also viewed as a deferred wage or an income stream to provide for loss of income upon retirement. E. Allen, Jr., J. Melone, and J. Rosenbloom, "Pension Planning" 2-7, 33 (5th ed. 1984). That pensions are not solely a reward for service is evidenced by the facts that one cannot draw on them at all until a certain age; some minimum amount can be drawn after a miniscule service period; there is a significant actuarial reduction for those who retire before the "normal retirement age" (usually 65); and they are often payable at least until death whether one lives 10 or 40 years after retirement.

In short, pension benefits, in their role as income replacement, make it possible for eligible employees to choose retirement. We do not think that an older employee is deprived of a benefit when the employer simply makes it possible for more employees to choose retirement.

calculation of benefit amount, this incentive will increase the periodic benefit of every employee. Both IBM and Xerox have recently offered five year age and service add-ons. Daily Labor Report (BNA), Dec. 19, 1986, A-9. If every employee is given the add-on, there is no disparate treatment on the basis of age. Some employees will become eligible for early or full benefits who were not previously eligible. As discussed above with regard to providing actuarially unreduced benefits to younger employees, this simple expansion of the group eligible for retirement does not deprive the older worker of a benefit, and such a plan would be lawful under §4(a)(1). 16/

In sum, these examples make clear that there are several early retirement incentives already in use by major companies which do not violate §4(a)(1).

III. Application Of The §4(f)(2) Exemption To Retirement Incentives

It is settled that exceptions to §4(a)(1)'s prohibition against discrimination are to be narrowly construed 17/ and that to establish the §4(f)(2) defense the employer must show: 1) there is a bona fide employee benefit plan; 2) the action was taken in observance of its terms; and 3) the plan is not a subterfuge to evade the purposes of the Act. United Airlines v. McMann, 434 U.S. 192, 198 (1977).

The court of appeals in this case ruled that the School Board and union were "observing the terms" of their incentive plan. We agree, and believe that this will seldom be a disputed issue in litigation attacking early retirement incentives.

The court of appeals also ruled that the incentive plan was a "bona fide employee benefit plan" within the meaning of

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16/ Some employers limit add-ons by capping them at a given age or by limiting total service credits. This memorandum cannot analyze the many variations which exist.

17/ Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 469 U.S. 832 (1982); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 766 (1977).

siginificant cost considerations (see supra at 8-9) 18/, but that the School Board and union must prove that their actions were not a "subterfuge" by showing "a legitimate business reason for structuring the plan as [they] did." (supra at 10-11). It added that the district court should seek the Commission's guidance concerning the meaning of subterfuge as applied to the ADEA as amended in 1978.

A. The Meaning of "Subterfuge" In The Context of Early Retirement Incentives

1. "Subterfuge" in General

Even if an early retirement plan qualifies generically for the shelter of §4(f)(2), the employer must prove that the plan is not a "subterfuge to evade the purposes of the Act."

18/ Although the question whether the North Tonawanda incentive is a "bona fide benefit plan" need not be extensively addressed because the district court cannot reverse the Second Circuit's ruling, we question that aspect of the court of appeals' construction of §4(f)(2). An incentive plan could fall within §4(f)(2) if it were a plan in which age is an actuarially significant factor in plan design (44 Fed. Reg. 30649-50; 29 C.F.R. §860.120(a)(1) and §860.120(b)) or where the plan is so enmeshed with the underlying pension plan that it becomes a coordinated benefit plan. Clearly, there are no actuarial considerations in a plan which offers $10,000 to all workers age 55-60 and nothing to those over age 60. The court rejected the argument that §4(f)(2) covered only those "plans" in which benefit reductions are justified by "actuarially significant cost reductions" on the ground that the regulations at 29 C.F.R. 860.120(a)(1) do not specify that "'cost considerations' must be actuarially based," and that there are cost considerations in that the employer saves more years of continued full salary by inducing younger workers to leave. This interpretation runs afoul of §4(f)(2). For the reasons discussed infra at 28-32, that section insulates unequal benefits only where the age of the employee actually increases the cost, vis-a-vis the younger worker, of providing the benefits. A $10,000 incentive for early retirement costs the same regardless of whether it is offered to a 59 or 61 year old. Section §4(f)(2) does not permit the employer to withhold it from the older worker on the ground that the latter may have received salary for working two years longer than the younger employee. It is a newly created benefit which is wholly independent of salary. As was true in Borden's and in Alford v. City of Lubbock, 664 F.2d 1272 (5th Cir.), cert. denied, 456 U.S. 975 (1982), this was "a simple fringe benefit administered in a single easily calculated payment" not intended by Congress to be encompassed by §4(f)(2). Employers should not be able to avoid the clear import of Bordens, Alford and EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 105 S.Ct. 92 (1984), by the simple expedient of labeling a plan a "retirement incentive" rather than "severance pay."

Indeed, North Tonawanda has not argued that this incentive was designed to coordinate with the existing pension plan so as to compensate employees under age 61 for receiving reduced pension benefits due to early retirement. It almost certainly could not do so because (1) the same lump sum amount is offered to those of varying ages, and (2) 60 is the normal retirement age under the North Tonawanda plan, 60 year old persons, therefore, receive both full retirement and the lump sum. For these reasons, the incentive was not so closely related to the retirement plan so as to be swept into §4(f)(2)'s coverage.

"Subterfuge" is a "scheme, plan, stratagem or artifice of evasion." Potenze v. New York Shipping Assn., 864 F.2d 235, 238 (2d Cir. 1986), citing United Airlines v. McMann, 434 U.S. 192, 203 (1977). Thus the employer must prove lack of intent to evade the purposes of the Act. EEOC v. Eastern Airlines, ___ F.2d ___, 27 FEP Cases 1686, 1689 (5th Cir. 1980).

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers. Section 2(b), 29 U.S.C. 621(b). Where the employer has established or amended a benefit plan after passage of the ADEA to the disadvantage of older employees, it must prove that its action was prompted by legitimate, nondiscriminatory business reasons. EEOC v. Home Insurance Co. 672 F.2d 252, 260 n.11 (2d Cir. 1982); EEOC v. Baltimore & Ohio Railway Co., 632 F.2d 1113 (4th Cir. 1981); EEOC v. Eastern Airlines, 27 FEP Cases at 1689; Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980). However, we have concluded that congressional activity in the face of the Department of Labor's regulations makes clear that, through §4(f)(2), Congress intended to recognize only one legitimate reason for providing smaller benefits to older workers, viz., that the cost of the benefit increases because of age. See EEOC v. Borden's, Inc., 724 F.2d at 1396; EEOC v. Westinghouse Electric Corp., 725 F.2d at 224-25.

a. The 1967 Congress recognized that the cost of certain employment benefits increases with age. Senator Javits proposed the amendment which became §4(f)(2) in order to provide employers with the "flexibility" to make necessary distinctions based on age so as to ensure that employers would not be discouraged from hiring older workers because of the increased costs associated with providing benefits to them. Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967); See also EEOC v. Borden's Inc., 724 F.2d at 1396. Senator Javits explained:

> The amendment relating to . . . employee benefit plans is particularly significant. Because of it an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance

> benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

113 Cong. Rec. 31254-55 (1967)(emphasis added). The floor manager of the bill, Senator Yarborough, elaborated on the §4(f)(2) exemption, saying that older workers would not be denied employment but their rights to "full consideration" in pension plans would be limited. 113 Cong. Rec. 31255 (1979). 19/

Since 1967, Congress has acted to make clear that the exception is to be so limited. In 1969 the Department of Labor, which was then charged with administering the Act, published an interpretation specifically stating that §4(f)(2) only applied to employee benefit plans which involved age-related cost considerations. 29 C.F.R. 860.120, 34 Fed. Reg. 9709 (June 21, 1969):

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

In the course of considering the 1978 ADEA amendments, Senator Javits explicitly approved the government's interpretation, saying:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

19/ The views of Senators Javits and Yarborough, as sponsors of the ADEA, are entitled to substantial weight in interpreting the statute. FEA v. Alonquin SNG, Inc., 426 U.S. 548, 564 (1976).

124 Cong. Rec. 8212 (emphasis added); see also remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978)("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age based variations in benefits where the cost of providing benefits to older workers is substantially higher"); remarks of Rep. Waxman, 124 Cong. Rec. 7888 (1978) ("In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act."). The 1978 history is especially significant in construing the section because raising the minimum mandatory retirement age to 70 obviously affected the operation of §4(f)(2) plans and the section's purpose was thus a critical element of the 1978 amendments.

After recognizing and indicating agreement with the DOL interpretation of §4(f)(2), Congress reenacted the section unchanged except to specify that the exemption did not permit involuntary retirement. It also asked the Secretary of Labor to issue more comprehensive guidelines. 20/ Accordingly, in 1979, the Labor Department issued an amendment to its Interpretative Bulletin on Employee Benefit Plans (IB), 29 C.F.R. 860.120, 44 Fed. Reg. 30648 (May 25, 1979), which continued in effect the cost principle previously enunicated by the Department and endorsed by Congress. 29 C.F.R. §860.120(a)(1). More specifically, the regulations specify that a plan which prescribes lower benefits for older employees is "not a subterfuge within the meaning of §4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. §860.120(d).

b. Congress has twice amended the ADEA since Labor's 1979 Interpretative Bulletin. The Bulletin permitted a few exceptions to the "equal cost" principle which, inter alia,

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20/ See remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978); remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (1978) ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefits plans, and the Secretary is urged to act as soon as possible.").

allowed employers to include medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. §860.120(f)(ii)(A) and (f)(iv)(A). In 1982, Congress amended the ADEA to disallow the medicare exception. Section 4(g) of the ADEA, Pub. L. 97-248 §116. See also S. Rep. 97-494, 97th Cong., 2d. Sess, reprinted in 1982 U.S. Code Cong. & Admin. News 792. Last year Congress amended the statute to require pension benefit accruals beyond normal retirement age. Section 4(i) of the ADEA, Pub. L. 99-509 §9201.

The significance of these Congressional actions is that §4(f)(2) was left intact, along with Labor's "equal cost" interpretation after Congress indicated that it was familiar with the IB. Indeed, Congress acted only to abolish some of Labor's exceptions to the equal cost requirement. Under established principles of statutory construction, such activity strongly supports the conclusion that Congress has reviewed and approved Labor's position that §4(f)(2) allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age. 21/

2. "Subterfuge" in this litigation

21/ Andrus v. Allard 444 U.S. 51, 57 (1979) ("particularly relevant" that Congress has twice reviewed and amended the statute without rejecting the enforcing agency's view); United States v. Rutherford, 442 U.S. 544, 553-54 and n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention . . . of Congress and [it] has not sought to alter the interpretation although it amended the statute in other respects, then presumably the legislative intent has been fully discerned"). United States v. Correll, 389 U.S. 299, 305-06 (1967)("longstanding federal regulations and interpretations applying to unamended or reenacted statutes are deemed to have received Congressional approval and have the effect of law"). U.S. v. Cerecedo Hermanos y Compania, 209 U.S. 337, 339 (1908)(where meaning of statute in doubt great weight given to construction by department charged with execution of the statute, and reenactment by Congress, without change, of a statute which has received long continued executive construction, is an adoption by Congress of such construction). See also EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (Congress' silence during the many years a Commission regulation was extant suggests its consent to the Commission's practice).

a. The court of appeals recognized that defendants offered no proof on the issue of subterfuge and, therefore, that they did not qualify for the §4(f)(2) exception under the traditional analysis of United Airlines v. McMann, 434 U.S. 192 (1977) and its own decision in EEOC v. Home Insurance Co., 672 F.2d 252 (2nd Cir. 1982). However, it expressed doubt that the same analysis should apply to a case involving incentives. First, it evidenced confusion about the role of "voluntariness." It thought that perhaps the analysis of §4(f)(2) differed when there was no allegation that the plaintiffs were forced to leave the workforce. It also suggested that in such cases the employer would have a lighter burden of proof than if retirement was allegedly coerced. On one hand, it opined that the requisite evidence of business reasons in the context of voluntary early retirement incentives "would almost necessarily be less than what is required to make a showing in the case of a mandatory plan" because the older employee is not being tricked or coerced into leaving the workforce but "is being deprived only of the same opportunity to receive a bonus for early retirement as is accorded [younger] workers." 785 F.2d at 59. On the other, it recognized that such reasoning would virtually read the subterfuge language out of §4(f)(2) in regard to voluntary early retirement plans and that such result is inconsistent with the fact that Congress in 1978 left the subterfuge language intact at the same time that it specifically barred mandatory retirement. Accordingly, the court remanded the case to the district court with instructions to seek the EEOC's assistance with respect to the meaning of subterfuge.

b. To the extent that the court thought that "voluntariness" or lack of coercion to retire altered the appropriate legal analysis, we believe that the court confused issues which sometimes coexist in retirement incentive cases and also misconceived "the purposes of the Act." The voluntariness of a plan is pertinent to any claim that employees have, in fact, illegally been coerced into retirement. Voluntariness may also be a defense if the issue is whether the incentive is a pretext to get rid of those older workers who are eligible for it. 22/

22/ It is possible that an "incentive" plan could be structured so that, in fact, remaining employed is not a viable option for the employee. If so, the incentive would be a subterfuge. No such claim was made in this case and would have to be made by the retirees who were offered the incentive.

The issue here, however, is not whether the existence of the plan is a subterfuge or whether those 55 to 60 were coerced into retirement. Rather, the issue is whether the plan's structure -- by excluding those beyond age 60 -- is a subterfuge.

The older employees' exclusion from the benefit is not voluntary; hence, the fact that younger employees can choose whether or not to retire has no bearing on the claim here. 23/ By its statement that the incentive here does not deprive an employee of "continuation of his job" but "only of the same opportunity to receive a bonus" (785 F.2d at 59), the court appears to suggest that the purpose of the ADEA is only to bar discriminatory hiring and discharge and, therefore, a voluntary incentive plan which compels neither cannot be a "subterfuge." However, as noted above, the stated purpose of the Act is not only "to promote the employment of older persons based on their ability rather than age" but also "to prohibit arbitrary age discrimination in employment and to help employees and workers find ways of meeting problems arising from the impact of age on employment." §2(b), 29 U.S.C. 621(b)(emphasis added). Moreover, Congress declared it unlawful to discriminate not only in hiring and discharge, but also with respect to "compensation, terms, conditions or privileges of employment" (§4(a)(1)). Accordingly, it is evident that Congress' purpose was not only to end discriminatory hiring and termination but also to require employers to provide equal compensation and benefits. For this reason, we believe that the employer who compensates an older worker less than a similarly-situated younger worker pursuant to an incentive plan bears a burden of justifying its actions which is no lighter than the burden of justifying any other form of discrimination, and for the reasons we explained above at 28-32, that burden is to prove that the benefit was reduced because the cost of providing it increases as a function of age.

23/ For the reasons discussed supra at 17-18, the fact that the plaintiffs at one time had the option does not alter the fact that they do not have it now and younger employees do.

c. Under our analysis, the incentive offered in this case is a "subterfuge" because the denial of the benefit cannot be justified by age-related cost considerations. For this reason, it evades the ADEA's purpose of eradicating arbitrary age discrimination. For this reason alone, the §4(f)(2) defense is not available here.

Additionally, the incentive is structured so as to collide with another statutory purpose viz, promoting the employment of older workers. The plan is designed so that those who work past age 60 will not qualify for an employment-related benefit which is offered to younger retirement eligible employees. Thus, the employer is providing a disincentive for employees to remain past age 60. Indeed, it is clear that the motive of the North Tonawanda defendants is to eliminate their oldest workers. 24/ Withholding an equal benefit or privilege of employment for this purpose is clearly a "subterfuge to evade the purposes of the Act." 25/

IV. Case Law On Early Retirement Incentives

The few courts of appeals which have attempted to grapple with the legality of retirement incentives under the ADEA have done so without specific congressional or administrative guidance. Not surprisingly, given the complexity of the issue, the opinions reflect a great deal of confusion.

24/ The School Board argued in the appellate court (Bd. br. at 8) that it wanted to eliminate the higher salaries of veteran teachers. This motivation clearly discriminates against the older worker and violates the Act. See cases cited supra at 15 n.9. Moreover the logical solution for this problem would be to offer the incentive to all retirement eligible employees.

The brief of the New York Assn. of School Boards argues that:

> In New York, the mandatory retirement ages for teachers. . . .were abolished in 1984. . . .[and] [i]f the plaintiffs succeed in this case, the result will be either that elderly public employees may be separated for cause under decidedly unpleasant circumstances or they may retire earlier without any bonus.

25/ To the extent that employers extend a benefit to induce voluntary retirement -- and assuming no element of coercion -- their motivation is not particularly relevant and beneficiaries of the offer could not claim a violation of the Act. Here, however, the act complained of was not the extension, but the withholding, of a benefit for the purpose of discouraging the employment of all those over age 60.

Two cases were decided under §4(a)(1) and did not address the applicability of §4(f)(2). Dorsch, discussed supra at 22 n.14, did not involve an incentive, but an early retirement benefit which was available to the plaintiff who had been involuntarily retired. 26/ Under the plan, any employee whose age and service added up to "75" could receive $600 per month until age 62. The challenge was based on the notion that the total value of the benefit was greater for younger workers but, as noted above at 21, n.9, the court concluded that, because the monthly benefit was equal, §4(a)(1) was not violated. The fact that the benefit ceased at age 62 was neither challenged nor explained.

The issue in Britt v. E.I. DuPont de Nemours & Co., Inc., 768 F.2d 593 (4th Cir. 1985), was whether DuPont violated §4(a)(1) by requiring retirement eligible employees who elected seniority-based severance pay under a voluntary reduction in force program to defer receipt of their pension benefits. The court held that it did not, reasoning that severance pay was a wage substitute and that, as such, accepting it was the same as continuing to work for purposes of determining the accrual date of retirement benefits. The decision does not reveal whether younger employees who received severance pay were also required to defer receipt of pension benefits.

We believe that the Britt court erred in trying to distinguish Bordens and Westinghouse on the ground that in those cases the severance pay was "an arbitrarily determined. . . fringe benefit," while DuPont's severance pay was a "wage substitute". First, the severance pay in Westinghouse and Bordens was not arbitrarily determined but, like DuPont's, was based on years of service. Such bonuses, whether given as an incentive or upon involuntary termination, are clearly a reward for service but also do constitute a source of income to compensate for not working. Thus, the distinction between wage substitute and fringe benefit is artificial. More importantly, it is irrelevant. We are not prepared to say that the Britt court reached the wrong result, but its reasoning

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26/ Plaintiff's original complaint attacked only his termination. He subsequently amended it to challenge the early retirement plan.

is flawed because it did not really grapple with the critical issue viz., whether older employees who took the incentive received a lesser benefit than younger employees who took the incentive. In any event, since they do not involve §4(f)(2), neither Britt nor Dorsch assist in answering the issue in Cipriano.

The defendants in this case tend to rely primarily on Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984). Mason has no bearing on the issues presented here. It involved a challenge to the federal employee program for early retirement at times of reductions in force. The challenge was lodged by an employee who was under the floor for eligibility and who argued that the applicable retirement provisions were repealed by the ADEA. 27/ The court simply held that the mere existence of a voluntary incentive plan which did not force retirement was not a subterfuge, a proposition with which we agree. As noted above, the issue here is that the employer is offering an unequal incentive, an issue not addressed in Mason.

Patterson, on the other hand, is relevant because the court upheld a "sliding scale" incentive. The court's analysis, however, is difficult to follow. On the one hand, the court recognized that to fit within §4(f)(2) a plan must be "a systematic interrelated structure where consideration of age is an actuarial necessity." On the other, it proceeded to hold, essentially, that a voluntary plan is immune from scrutiny. It did not analyze the meaning of "subterfuge" but, instead, reasoned that since the Supreme Court in United Airlines v. McMann, 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, "a voluntary plan is a fortiori permissible".

Patterson failed to recognize, first, that the McMann

27/ In a RIF, the federal law simply lowers the number of years of service and age at which one becomes retirement eligible. 5 U.S.C. 8336(d).

plan was upheld on the ground that it was established before the ADEA was enacted and, therefore, could not have been a "subterfuge to evade the purposes of the Act." The Patterson plan was instituted after the passage of the ADEA. Second, McMann was overruled by the 1978 amendments in which Congress made clear that involuntary retirements were unlawful. The Patterson court neither mentioned nor addressed the effect of the amendments.

Another case sometimes cited in early retirement litigation is Parker v. Federal National Mortgage Assn., 741 F.2d 975 (7th Cir. 1984), in which the court perfunctorily rejected plaintiff's claim that he was discriminatorily denied severance pay. The case primarily concerned plaintiff's allegation that he was forced into early retirement and the court rejected that claim on the facts. In response to his allegation that he was denied severance pay because of his status as a retiree, the court merely stated that the decision to be laid off or retired was his choice. In fact, the decision indicates that plaintiff's choice was between retiring or being transferred to another office. The court made no effort to compare the treatment of plaintiff vis-a-vis younger employees or to analyze the requirements of the 4(f)(2) exception. Thus, it too fails to provide an analysis of the issue at hand.

The Second Circuit, in a case decided after Cipriano, had occasion to discuss §4(f)(2) in a different context. Potenze v. New York Shipping Assn., 804 F.2d 235 (2nd Cir. 1986), involved a guaranteed annual income (GAI) program under which longshoremen were guaranteed a certain annual salary up to age 70. Because of a change in an IRS ruling, the union decided to offset social security benefits from the GAI. The offset began at age 65 rather than at age 62 when workers could elect reduced social security. The challenge was lodged by those over age 65 who claimed that the 62-64 year old group received a windfall in that they could obtain full GAI plus early social security, whereas the 65 to 70 group received only the GAI amount.

The court concluded that the GAI plan was a §4(f)(2) covered "benefit plan" because, if age related cost considerations must be proven, the union showed that the offset results in savings to the fund. The court failed to recognize, as discussed supra at 28-32, that the only permissible cost savings are those which increase as a function of age. *See also*, *supra* at 15 n.9. The court further found that the plan was not a subterfuge on the ground that the Labor Department's Interpretative Bulletin allows employers to consider the value of government-conferred benefits in designing retirement insurance plans. The court also observed that, were the offset to begin at age 62, employees would be forced to take reduced social security at that age which would continue to be reduced beyond age 70, when GAI was no longer available, and that such result would frustrate the purposes of the Act. 28/ This aspect of the opinion obviously has no bearing on the issues in this case.

In sum, no court of appeals has yet analyzed the legality of early retirement incentives in a way that comes to grips with the logic of the statute, its clear prohibition against age discrimination in benefits, and the legislative history of §4(f)(2).

CONCLUSION

We recommend that the Commission file a brief in intervention in the District Court explaining the meaning of subterfuge and providing examples of lawful plans as set forth above. If the Commission wishes to analyze the lawfulness of other kinds of plans and consider the possible impact of §4(i) on plans effectuated in the future, it could solicit comments from interested parties through an advance notice of proposed rulemaking. The complexity of the issues with respect to more sophisticated plans makes it especially appropriate to obtain as much input as possible from interested parties. In the interim, we think that this memorandum provides the structure for analyzing the issues in this case and preparing a brief to the district court.

28/ Curiously, since plaintiffs apparently were not arguing that no offset should occur, but only that it should begin at 62 rather than 65, they would not have received any greater benefit even if they had prevailed. This anomoly may have influenced the result.

Sarah M. CIPRIANO and Jeune M. Miller, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF the CITY SCHOOL DISTRICT OF the CITY OF NORTH TONAWANDA, NEW YORK, and North Tonawanda United Teachers, Defendants-Appellees.

No. 60, Docket 85–7366.

United States Court of Appeals,
Second Circuit.

Submitted Oct. 16, 1985.

Decided March 4, 1986.

Retired school teachers brought action alleging that plan providing incentives for early retirement, for which they were ineligible due to their age, violated the Age Discrimination in Employment Act. The District Court for the Western District of New York, John T. Curtin, Chief Judge, entered summary judgment in favor of school and union, and former teachers appealed. The Court of Appeals, Friendly, Circuit Judge, held that: (1) plan was a "bona fide employee benefit plan," but (2) employer and union were required to show that the plan was not subterfuge to evade purposes of the Act.

Reversed and remanded.

1. Civil Rights ⇨9.15

Incentive plan in collective bargaining agreement providing additional benefits for employees between certain ages who elected early retirement was a "bona fide employee benefit plan" within meaning of exemption from Age Discrimination in Employment Act in the sense that employees benefited and substantial benefits were paid to those covered by it. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C.A. § 623(f)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇨9.15

Even case of voluntary early retirement plan, employer and teacher's union with which it negotiated collective bargaining agreement were required to show that plan was not a subterfuge to evade purposes of Age Discrimination in Employment Act by showing legitimate business reason for structuring plan to offer incentive of cash or cash and additional medical benefits for those electing early retirement. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C.A. § 623(f)(2).

3. Federal Civil Procedure ⇨1831

In action by retired former teachers alleging that plan providing incentives for early retirement, for which they were ineligible, violated Age Discrimination in Employment Act, issue as to whether plan was subterfuge to evade purposes of Act precluded dismissal for failure to state a claim. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C.A. § 623(f)(2); Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

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Before FRIENDLY, KAUFMAN and PRATT, Circuit Judges.

FRIENDLY, Circuit Judge:

This is an appeal from an order of the District Court for the Western District of New York granting summary judgment in favor of defendants in an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, brought by two former teachers in the North Tonawanda City School System against the Board of Education of the City School District of the City of North Tonawanda, New York (the Board) and the North Tonawanda United Teachers (the Union). The complaint was directed at a provision of a collective bargaining agreement between the defendants effective July 1, 1980, through June 30, 1983 (sometimes hereafter "the incentive plan"), which offered retirement incentives[1] to members of the bargaining unit between the ages of 55 and 60 who retired effective between July 1 and February 1 in any of the three years of the agreement and had completed 20 years of service under the New York State Teachers Retirement System. These payments were in addition to the benefits otherwise payable upon early retirement. Unfortunately, because of the premature stage at which the decision below was rendered, the record does not include the terms of the underlying retirement plan in effect in the school system. We assume, based on the reference in the collective bargaining agreement and on statements in defendants' briefs, Brief for Appellee Board at 8; Brief for Appellee Union at 14, that the school system subscribed to the retirement plan in effect under the New York State Teachers' Retirement System (NYSTRS), N.Y.Educ. Law §§ 501-535 (McKinney 1969 & Supp. 1984).

Plaintiffs were 61 years old on July 1, 1980, and thus ineligible for the incentive plan by its terms.[2] They retired on June 30, 1981, when they were over 61 years old. On May 23, 1981, shortly before their retirement, contending that depriving them of the incentives because of their age violated the ADEA, plaintiffs filed complaints with the Equal Employment Opportunity Commission (EEOC), which is alleged to have sent a letter of violation to the defendants on April 27, 1982. Thereafter the EEOC attempted to conciliate plaintiffs' claim but commenced no formal action on plaintiffs' behalf. Plaintiffs then commenced this action on January 24, 1984, each claiming as damages the $10,000 she would have been entitled to receive under Option B if the incentive plan had applied to her at the time of her retirement, in addition to punitive damages based on the allegedly wilful nature of the violation, attorney's fees, costs, and other appropriate relief.

The Board filed an answer, containing ten "affirmative defenses." None of these was the provision in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which was to become the basis for the decision below. The Union filed a motion to dismiss the complaint on various grounds, including that it failed to state a claim upon which relief can be granted, which the district court appears to have treated as having been filed on behalf of the Board as well. The asserted failure to state a claim was premised on § 4(f)(2), which provides that it shall not be unlawful for an employer, employment agency, or labor organization to

> observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pen-

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[1] The incentives consisted of two options. Under Option A the Board would pay the cost of Blue Cross/Blue Shield and Major Medical Insurance until the retiree reached the age of 65 at the same level as was accorded to regular staff members, and also $2000 plus $50 for each complete year of service beyond 20 years. Under Option B the Board would pay a lump sum of $10,000.

[2] The Board asserts that a "window" provision entitled plaintiffs to the incentives if they retired by June 30, 1980, and that the plaintiffs failed to take advantage of the window provision. The alleged "window provision" is not in the record, however, and we would not find it material to our decision if it were, since appellants' claim is not that they were denied the opportunity ever to participate in the incentive, but that they were denied the opportunity to do so on the date they ultimately chose to retire.

> sion, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

After oral argument some months later the court entered an order stating that upon the present record the court was unable to grant the defendants' motion to dismiss and that it was unable to treat the motion as one for summary judgment, since the defendants had failed to provide the court with affidavits accompanied by a copy of the collective bargaining agreement. The order directed the defendants to file an affidavit to which such a copy was attached, with the averments restricted to the authenticity of the agreement; plaintiffs' response, if any, was to be similarly limited. The Union filed an affidavit apparently complying with the court's direction; the docket entries recite that plaintiffs filed an affidavit in opposition but this is not in the record before us.

After several months the judge rendered an opinion granting summary judgment in favor of the defendants in reliance on § 4(f)(2). Stressing the voluntary nature of the incentive plan, he found that the plan attacked by the plaintiffs was a bona fide retirement plan within § 4(f)(2) and that there was "nothing in this record to indicate that this plan is a subterfuge to evade the purposes of the act." After citing *Mason v. Lister*, 562 F.2d 343 (5 Cir. 1977), and *Patterson v. Independent School District # 709*, 742 F.2d 465 (8 Cir. 1984), he went on to say:

> Congress meant to protect older individuals against forced discharge and barriers blocking employment opportunities when it enacted the ADEA. At the same time, Congress meant to preserve incentives for early voluntary retirement, recognizing that they are useful and necessary devices which employers can use to manage their work forces. The plan at issue here is consistent with both objectives.

No reference was made to our statement in *EEOC v. Home Insurance Company*, 672 F.2d 252, 257 (2 Cir.1982), that the burden of proving absence of subterfuge for the purposes of the § 4(f)(2) defense is on the defendants.

Plaintiffs appealed. Their initial brief, of six pages, was perfunctory. A more helpful brief in support of their position was filed by the American Association of Retired Persons as *amicus curiae*. Briefs were filed by the Board and the Union as appellees, and by the New York State School Boards Association as *amicus curiae* urging affirmance. The case was submitted without oral argument.

DISCUSSION

Decision here is rendered difficult because of the peculiar posture in which the case comes to us. While the district court went through the form of converting the Union's Rule 12(b)(6) motion into one for summary judgment, the limitations which it imposed on the affidavits of both parties prevented them from having a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56," as Rule 12(b)(6) requires. *Cf. Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 767 (2 Cir.1983). The practical effect was the same as if plaintiffs had amended their complaint to append the collective bargaining agreement and defendants had moved to dismiss the case under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For purposes of our discussion, we shall treat the case as if it had been decided in this way.

It is undisputed that, if it were not for § 4(f)(2), the incentive plan would run afoul of § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), which makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privi-

> leges of employment, because of such individual's age.

Appellants offer two principal arguments to explain why the incentive plan does not come within § 4(f)(2). They contend that defendants have failed to sustain the burden of showing that it was a "bona fide employee benefit plan such as a retirement, pension, or insurance plan" and that, if the first argument fails, defendants have failed to sustain the burden of showing that it was not a subterfuge to evade the purposes of the ADEA.

[1] We see no merit in appellants' first contention. On its face the incentive plan is a "bona fide employee benefit plan" in the sense that employees benefited and substantial benefits were paid to employees who were covered by it, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194, 98 S.Ct. 444, 446, 54 L.Ed.2d 402 (1977); *EEOC v. Home Insurance Co., supra*, 672 F.2d at 257. Apart from the fact that the phrase "such as a retirement, pension, or insurance plan" provides illustrations rather than limitations, *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5 Cir.1974); *Patterson v. Independent School District # 709, supra*, 742 F.2d at 466–67; *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (3 Cir.1983), *cert. denied*, — U.S. —, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984), we see no reason to doubt that the incentive plan, when read as a supplement to an underlying general retirement plan, was a "retirement" plan for the purposes of § 4(f)(2).

Appellants would limit the statutory language to plans in which age-based benefit reductions are justified by actuarially significant cost reductions, referring to the interpretation of § 4(f)(2) at 29 C.F.R. § 860.120(a)(1), issued by the Department of Labor shortly before its functions in enforcing the ADEA were transferred to the EEOC effective July 1, 1979.[3] The actual language of the interpretation reads in relevant part:

> The legislative history of [§ 4(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed.

The language does not assist appellants. The interpretation says nothing to the effect that "cost considerations" must be actuarially based. The phrase "cost considerations" was used, as the interpretation states, to rule out from the scope of § 4(f)(2) plans that would curtail or reduce such benefits as "paid vacations and uninsured paid sick leave" for older workers, since reduction in these benefits would not be justified by significant cost considerations.

Significant cost considerations are often involved, however, in designing incentives for older employees voluntarily to leave the workforce because those who continue working beyond a certain age will often draw a salary that is significantly higher than the periodic payments obtainable under a pension plan. Since the employer's goal in offering early retirement incentives is often to save expenses by reducing the size of the workforce, it is only reasonable for the employer to offer more to those employees who choose to leave at a younger age, saving the employer more years of continued full salary, than to those who remain in the workforce and do not confer on the employer the sought-after benefit. *Cf. Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4 Cir.1985) (no ADEA violation by employer in conditioning eligibility for payments under voluntary reduction in force program on willingness to defer pension benefits; plaintiffs not entitled "both to retirement benefits *and* the wage substitute of severance pay"). An additional incentive for early retirement is generally no more repugnant to the purpose of § 4(f)(2), which is in part to permit employers to offer compensation to older workers who choose to exit the workforce, than any more traditional retirement plan contemplated by that section. For the purpose of determining whether a plan is a "bona fide employee benefit plan" within the meaning of § 4(f)(2), it is immaterial that a more nicely tailored plan would have provided in Option B for a bonus starting at higher than $10,000 and gradually tapering off, with perhaps some small amounts continuing beyond 60. The way the plan is structured affects only whether it might be a subterfuge to evade the purposes of the Act, not whether it qualifies generically for the shelter of § 4(f)(2).

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[3] The EEOC has not issued its own general interpretations governing the types of plans that fall within § 4(f)(2), but it has characterized those of the Department of Labor as "currently applicable," *see* 29 C.F.R. § 1625.10.

Appellants seek to buttress their argument with three decisions of other circuits. *Alford v. City of Lubbock*, 664 F.2d 1263 (5 Cir.), *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 848 (1982); *EEOC v. Westinghouse Electric Corp., supra*, 725 F.2d 211; and *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9 Cir.1984). Each of these cases is distinguishable, however, because the fringe benefits that were tied by the employer to the retirement plans could in no way be considered to be functionally related to those plans, as is the case with the incentive plan here.

In *Alford*, the defendant city had a retirement policy that required employees to retire at the age of 65,[4] and that made employees eligible for retirement benefits only if they had been employed for 15 years or more. Accordingly, in order to save administrative costs from needlessly collecting and refunding plan contributions to ineligible employees, no employee hired after his fiftieth birthday would be allowed to participate in the retirement plan. The city also had a policy, however, of paying all employees who retired under the plan for accumulated but unused sick leave up to a total of 90 days. Two employees who had been ineligible for the retirement plan but were forced to retire at age 65 brought suit claiming that they were impermissibly discriminated against by virtue of being denied retirement benefits altogether and also because they were denied the accumulated sick leave pay afforded other employees who were eligible for the retirement plan. The court upheld the provision denying retirement benefits to employees hired after their fiftieth birthdays as a legitimate age-related-cost-justified restriction, entirely in accord with congressional intent in enacting § 4(f)(2), 664 F.2d at 1269–71, but struck down the denial of the sick-leave benefits to the plaintiffs because this was not the type of plan entitled to protection under § 4(f)(2) and because the sick-leave policy formed no part of the pension plan, *id.* at 1271–72. Although eligibility for the accrued sick pay was *conditioned on* eligibility for retirement benefits, this was insufficient to shield the sick-pay policy because the condition was "functionally irrelevant to any 'retirement, pension, or insurance plan,'" *id.* at 1272, and thus was indistinguishable from any other fringe benefit that might be offered to employees but would fall outside § 4(f)(2).

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[4] The *Alford* case was not governed by the 1978 amendments, later discussed, which raised the age at which retirement could be compelled from 65 to 70 and limited § 4(f)(2) to voluntary retirement plans.

Alford is inapposite to this case because the North Tonawanda incentive plan was functionally related to the underlying retirement plan. There is nothing inconsistent with the ADEA in offering older employees compensation for leaving the workforce, as is plain from the fact that retirement plans are included within the protection of § 4(f)(2). Because the special incentive simply increases that compensation and, like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan. *Cf. EEOC v. Fox Point-Bayside School District*, 772 F.2d 1294, 1301 (7 Cir.1985) (rejecting EEOC's argument that provision in collective bargaining agreement was not part of a statutory retirement plan for the purposes of § 4(f)(2) simply because the terms were not incorporated into one document). By providing an enhanced inducement for employees to retire early, the incentive plan furthers the legitimate purpose behind such a plan. The sick-pay policy in *Alford*, however, had nothing to do with retirement itself, but was a reward for past conduct—staying healthy and on the job—which was equally valuable to the employer regardless of the employee's age or length of service. Age, or retirement eligibility, was completely unrelated to the purpose of the challenged benefit.

Westinghouse and *Borden's* are inapposite for reasons similar to *Alford*. In *Westinghouse*, the provision under attack was a provision in a layoff benefit plan (LIB Plan) in effect at plants that were being closed by the employer, under which benefits were denied to those laid-off employees who were eligible for early retirement. The court concluded that there was

> no age-related cost factor on the face of the LIB Plan which justifie[d] Westinghouse's actions.... [T]he fact that the LIB Plan [was] tied to Westinghouse's Pension Plan [did] not negate the fact that it [was] more analogous to a 'fringe benefit' than to the types of employee benefit plans covered under [§]4(f)(2).

725 F.2d 224–25. The only reason for distinguishing between younger employees and those who were denied the benefits was that the latter had early retirement benefits as an option to fall back on in the absence of the layoff benefits, whereas the younger employees would have had nothing. But, as in *Alford*, "[t]he LIB Plan, ... [was] functionally independent of the Pension Plan," and "[t]he mere fact that the benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB ... [did] not merge the two plans into a single 'coordinated benefit plan'" for the purposes of § 4(f)(2). *Id.* at 225. *Borden's* is distinguishable on the same grounds. It involved a severance pay plan for the closing of a plant under which employees eligible for early retirement were ineligible for the severance pay. The court found that this "one-time, ad hoc cash payment" was simply unrelated to the kind of "on-going benefit schemes" that were intended to be protected under § 4(f)(2). 724 F.2d at 1396.

More nearly apposite is one of the cases cited by the district court, *Patterson v. Independent School District # 709, supra*, 742 F.2d 465. There the Eighth Circuit upheld a special early retirement incentive bonus, in conjunction with a retirement plan which had a normal retirement age of 65, under which a teacher could receive a lump-sum payment of $10,000 for choosing to retire at age 55, diminished by $500 for each year over 55 until age 60, and by $1500 for each year over 60. This had the result that teachers who retired over 65, including the 67-year-old plaintiff, received nothing under the incentive. The court had little trouble in finding that the plan was of a type that "qualifies for approval under § [4](f)(2)." It found that in order to overcome the incentive for teachers to continue to work until normal retirement age, the plan "would furnish an incentive for teachers to trigger or activate the general pension plan at an earlier age, by holding out the 'carrot' of 'an early retirement incentive ...' if eligible for ... retirement at 55." *Id.* at 467–68.

We reach a different conclusion with respect to appellants' alternative argument, that defendants did not bear their burden of showing that the incentive plan was "not a subterfuge to evade the purposes of" the ADEA sufficiently to justify dismissal of the complaint without a trial. Here some history is in order.

As originally enacted, § 4(2)(f) did not contain what is now the final clause:

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977), the Court, dealing with a plan long antedating the ADEA, held that the section, as it then stood, permitted plans compelling retirements before the age of 65 unless the plan was a subterfuge to evade the purposes of the Act.[5] The Court, speaking through the Chief Justice, gave the subterfuge phrase a quite restrictive meaning. It said, 434 U.S. at 203, 98 S.Ct. at 450, that:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense. So read, a plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.[6]

The Court did not determine who had the burden of proof on the question whether the plan was not a subterfuge in cases in which the plan post-dated the passage of the Act.

We dealt with that question in *EEOC v. Home Insurance Company*, 672 F.2d 252 (1982). This concerned a 1974 amendment to Home's retirement plan which lowered both the normal retirement age[7] and the mandatory retirement age from 65 to 62. The EEOC's attack was leveled at the lowering of the mandatory retirement age, which it contended to have been a subterfuge to evade the purposes of the ADEA.

This court, speaking through Judge Kearse, began its discussion by holding that an employer relying on § 4(f)(2) had the burden of establishing the three elements of that defense, namely

> (1) there must be a bona fide (retirement) plan, (2) the action must have been taken in observance of its terms, and (3) the retirement plan must not have been a subterfuge to evade the purposes of the ADEA.

672 F.2d at 257. It then held that the mere fact that a plan is bona fide in the sense that it paid substantial retirement benefits does not establish that it is not a subterfuge, *id.* at 260, a conclusion which the statutory language makes rather clear. The opinion said of *McMann:*

> The ruling in *McMann* does not purport to relieve all employers of all obligation

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[5] The "subterfuge" language had appeared in the version of § 4(f)(2) contained in the original administration bill, which provided:

> It shall not be unlawful for an employer ... to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act....

S. 830, 90th Cong., 1st Sess. § 4(f)(2), 113 Cong. Rec. 2794 (1967); *see McMann*, 434 U.S. at 199 n. 6, 98 S.Ct. at 448 n. 6.

[6] Justice Stewart, concurring, would have placed decision of the "subterfuge" issue solely on the ground that the plan long antedated the Act, 434 U.S. at 204, 98 S.Ct. at 450; Justice White, concurring, thought that this consideration deserved no weight, *id.* at 204–05, 98 S.Ct. at 450–51; Justices Marshall and Brennan dissented in an opinion by the former, *id.* at 208, 98 S.Ct. at 453.

[7] This means the age at which an employee can retire and receive full pension benefits without actuarial reduction.

> to prove economic or business purposes in order to disprove subterfuge. Rather, the thrust of *McMann* is that where the plan is bona fide, in that it pays substantial benefits, and where the action taken is in observance of its terms, the employer can meet its burden of proving that the plan is not a subterfuge simply by showing that it was established long before the ADEA was enacted. Where, however, the pertinent terms of the plan were adopted after the ADEA was enacted, this avenue of disproving subterfuge is simply not open. Proof by the employer of non-age-based reasons will then be required.

Id. at 258–59. The court concluded that *Home* had not established sufficient "valid business reasons" for lowering the mandatory retirement age to have justified the grant of summary judgment in its favor.

Home would clearly require reversal here, where the defendants submitted nothing to satisfy their burden, were it not for the fact that the incentive plan here at issue, conformably with the 1978 amendment, did not compel plaintiffs to take early retirement. It can be argued with some force that this distinction renders *Home* inapplicable. As Judge Kearse said, 672 F.2d at 261, "Forcing an employee to retire at a given age is hardly the same as merely permitting him to do so. Only the forced retirements are under attack." Moreover, the subterfuge provision came into the ADEA in a portion of the administration bill which dealt solely with compulsory retirement, *see* note 5 *supra*. Finally, it is rather hard to give content to the concept of "subterfuge" when that term is applied to a plan for voluntary action, there is no claim that the option was illusory, and the complaint is made, not by employees who claim that they were tricked by the option into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option. Beyond this, 29 C.F.R. § 1625.9(f) of the interpretive regulations issued by the EEOC, to which enforcement of the ADEA was transferred from the Department of Labor in 1979, provides in part:

> Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option.

[2] Without further guidance from the EEOC, however, we hesitate to go so far as practically to read the subterfuge clause out of the statute in regard to voluntary early retirement plans, as the district court did. When Congress amended the ADEA in 1978 to ban mandatory retirement plans of the sort at issue in *McMann* and *Home*, it left the subterfuge language in the statute; the statute still requires the employer to show something more than that the plan was a bona fide plan. Although 29 C.F.R. § 1625.9(f) approves of early retirement plans generally, its focus seems to have been on the traditional plan under which an employee can retire early for a significantly reduced pension, and it does not necessarily go so far as to approve of all early retirement plans, regardless of how their incentives may be structured. Most important of all are the regulations promulgated by the Department of Labor on May 25, 1979, contained at 29 C.F.R. § 860.120, interpreting § 4(f)(2), which are still held to be applicable pending the EEOC's promulgation of its own regulations, *see* 29 C.F.R. § 1625.10. These regulations, enacted *after* the 1978 amendments went into effect, clearly assume that the "subterfuge" requirement has continued vitality, and seem to put a fairly heavy burden on the employer to justify any age-based distinctions in employee benefit plans on the basis of "age-related cost justifications." While we would not wish to be understood as endorsing every detail of the regulations, we cannot simply disregard them. All that we now decide is that even in the case of voluntary early retirement plans the employer—and also here the union—must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did.

The authorities cited by the district court are not to the contrary. In *Patterson v. Independent School District # 709, supra*, 742 F.2d at 466, apart from the more carefully tailored nature of the plan which we have described above, plaintiff did not contend that defendants' action constituted a subterfuge. *Mason v. Lister, supra*, 562 F.2d 343, involved an attack on a voluntary retirement plan linked to a major reduction in force at a federal agency, § 5 U.S.C. § 8336(d)(2). The attack was by a worker who had not yet attained the floor for access to the early retirement option, and such a floor is inherent in any age-based retirement plan within the purview of § 4(f)(2).

[3] We would not wish our decision here to be read as a disapproval of voluntary early retirement plans in general or of this plan in particular. The evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan. Here the older worker is not being deprived of continuation at his job or of pension benefits. He is being deprived only of the same opportunity to receive a bonus for early retirement as is accorded workers in the age bracket just below him. We decline to speculate on the precise contours of that showing in light of the extremely scant record before us and without initial consideration by the district court. On the remand we are directing, the district court should seek the assistance of the EEOC, whether as an intervenor or *amicus curiae;* perhaps before the case is heard, that agency, after the lapse of seven years, may have issued its own guidelines with respect to the meaning of subterfuge as applied to the ADEA as amended in 1978, or with respect to the permissible means of structuring voluntary retirement plans. *See EEOC Issues First Opinion Letter Since Taking Over Program in 1979*, [Jan.-June] Pens.Rep. (BNA) No. 1, at 3 (Jan. 2, 1984) (EEOC source indicates agency shortly intends to address "question of the legality of early retirement incentive programs.").

The summary judgment dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

SUN SHIP, INC., Appellant and Cross-Appellee,

v.

MATSON NAVIGATION CO., Appellee and Cross-Appellant.

Nos. 85-1280, 85-1292.

United States Court of Appeals,
Third Circuit.

Argued Jan. 17, 1986.

Decided March 4, 1986.

Shipbuilder sought to vacate or correct award in commercial arbitration between it and shipowner. Shipowner cross-petitioned to confirm the award. The United States District Court for the Eastern District of Pennsylvania, Marvin Katz, J., 604 F.Supp. 1223, confirmed the award. Shipbuilder appealed. The Court of Appeals, Gibbons, Circuit Judge, held that: (1) the arbitrators did not exceed their authority in awarding prejudgment interest at prime rate rather than at the Pennsylvania statutory rate; (2) the vessel owner was entitled to interest from the date of the award, not from the date of the judgment confirming it; and (3) the shipbuilder's frivolous award rendered it liable for attorney fees and double costs where the shipbuilder had agreed in writing to the submission of the prejudgment interest issue to the arbitrators.

Affirmed in part, reversed in part and remanded.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and
JEUNE M. MILLER,

Plaintiffs,

-vs- CIV-84-86C

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NORTH TONAWANDA.
NEW YORK; and NORTH TONAWANDA TEACHERS
ASSOCIATION,

Defendants.

The plaintiffs in this case are former teachers in the North Tonawanda City School System. They were subject to the terms of a collective bargaining agreement effective July 1, 1980, through June 30, 1983. The agreement provided, in part, that persons between the ages of 55 and 60 would be entitled to be given certain incentives to retire. The plaintiffs had passed their 61st birthdays prior to July 1, 1980. Therefore, they were not eligible for the retirement incentive.

The plaintiffs claim that the aforementioned incentive constituted age discrimination in violation of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. §§621, et seq. The defendants have moved for summary judgment. This motion shall be granted for the reasons stated below.

The purpose of the ADEA is to "promote employment of older persons based on their ability rather than age." 29 U.S.C. §621(b). Accordingly, Congress outlawed discrimination against persons on account of age in the hiring, compensation, and discharge of employees. 29 U.S.C. §623(a). However, the ADEA also provides that it is not unlawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . .

29 U.S.C. §623(f)(2).

The retirement plan at issue here contains an incentive for those over 55 who retire before their 61st birthday. Retirement is entirely voluntary. These plaintiffs were not forced to retire.

The plaintiffs allege that the plan reflects a willful effort to deprive the plaintiffs of benefits which are rightfully theirs. This allegation has not been enhanced beyond this very general statement. Thus, it appears that this allegation rests upon the circular argument that plaintiffs have a "right" to the incentive package because their entitlement to it is being denied solely because of their age. There is no suggestion that the creation of the incentive was designed to undermine Congress's purposes when it enacted the ADEA.

The court concludes that the defendants are entitled to summary judgment on the basis of section 632(f)(2). The plaintiffs do not allege that the plan pursuant to which early retirement incentives are provided is a sham plan which does not award substantial benefits. The plan is, therefore, a bona fide plan.

Nor do plaintiffs suggest that the defendants failed to observe the provisions in the plan. There is also nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act.

In Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), the court noted that a voluntary retirement plan similar to the one at issue here "could not be a subterfuge because it is strictly optional with the employees." Id. In a more recent case, the Eighth Circuit stated that voluntary retirement plans based upon age are permissible. Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984).

Congress meant to protect older individuals against forced discharge and barriers blocking employment opportunities when it enacted the ADEA. At the same time, Congress meant to preserve incentives for early voluntary retirement, recognizing that they are useful and necessary devices which employers can use to manage their work forces. The plan at issue here is consistent with both objectives.

The motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: April 5, 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SARA M. CIPRIANO and
JEUNE M. MILLER,

Plaintiff(s)

v.

CIV-84-800

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF
NORTH TONAWANDA, NEW YORK, and
NORTH TONAWANDA UNITED TEACHERS,

Defendant(s)

SIR/MADAM: Take notice of a JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 3rd day of April, 1985, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 3rd day of April, 1985.

Dated: Buffalo, New York
April 3, 1985

JOHN K. ADAMS, Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: David Gerald Jay, Esq.
James E. Rooney, Esq.
Bernard F. Ashe, Esq.
Emanuel Tabachnick, Esq.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

March 16, 1987

MEMORANDUM

TO : Clarence Thomas, Chairman
R. Gaull Silberman, Vice Chairman
Tony E. Gallegos, Commissioner
Fred W. Alvarez, Commissioner

Cyn Clark Matthews

FROM : Cynthia C. Matthews, Executive Officer
Executive Secretariat

SUBJECT : Commission Meeting - March 16, 1987 - 2:00 P.M.

REVISED OPEN SESSION

1. Announcement of Notation Vote(s)

   During the period of March 2 thru March 13, 1987, the Commission acted on 35 General Counsel recommendations by notation vote. It voted:

   --To litigate in 28 cases
   --To intervene in one case
   --Not to litigate in 6 cases

2. Report on Commission Operations ----- POSTPONED

3. Report on Pre-Complaint Counseling and Complaint Processing for FY 85

4. Proposed Compliance Manual, Section 630, Volume II, Unions ---POSTPONED

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 23, 1987

MEMORANDUM

TO: William Ng
Deputy General Counsel

FROM: James N. Pinney
Associate General Counsel

SUBJECT: EEOC v. Xerox Presentation Memorandum

This revised PM is attached, and submitted for review and forwarding to the Commissioners. Since briefing the Commissioners on this matter we have reviewed our notes of their comments, and have received several calls from special assistants with questions or clarifications on several points. We have tried to incorporate information, discussion and analysis to address the questions and concerns we received. Cases on several issues were suggested for review and that was done.

There are three possible courses of action. The Commission might view the findings as supporting an action in the nature of a pattern and practice case, either on the theory of disparate treatment, or on the theory of disparate impact. Secondly, the Commission might decide that the record only supports a consolidated action based on individual claims. Finally, the Commission might determine that the facts do not warrant further action.

Since Commission policy in the area of workforce reductions or early retirement programs is unclear or unsettled, we believe that it is appropriate that have the clearest opportunity to review and consider the several options presented. Any action taken can be prematurely interpreted--or, misinterpreted--as a reflection of Commission policy. Traditionally, the Commission has been careful to avoid creating confusion as to policy in unsettled, and sensitive areas before it has had an opportunity to formulate its views.

We would hope for some guidance as to how this matter might be resolved. It should be noted that some of our complainants will be affected by the statute of limitations after the end of this month.

Attachment

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

March 27, 1987

MEMORANDUM

TO : William Ng
Deputy General Counsel

FROM : Fred W. Alvarez
Commissioner

SUBJ : Litigation Recommendation
XEROX Corporation

I have voted to disapprove your litigation recommendation against Xerox Corporation dated March 24, 1987. So that there is no misunderstanding concerning the basis for my vote, I thought I should explain it in some detail.

A directed investigation was begun in this matter by headquarters Systemic Programs on February 7, 1984. Just two months later, in April, 1984, a Letter of Violation was issued by headquarters Systemic Programs finding the existence of policies and practices which violate the Age Discrimination in Employment Act. In February, 1987, nearly three years after the Letter of Violation, the Commission is given only a few days to consider a recommendation to litigate a matter of substantial importance on an all or nothing basis under threat of the passage of the statute of limitations applicable to "some individuals affected by the challenged practice". In my opinion, presenting the Commission with this stark alternative on the record we have and under circumstances requiring immediate turn around, is unconscionable.

I agree with the legal theories under which this litigation recommendation proposes to proceed. I am not, however, convinced that there has been a presentation of facts sufficient to support litigation under those theories. It appears possible that a number of individuals exist who may have been victimized by the targetting of older, higher paid workers and presenting them with an option to participate in a voluntary reduction in force under the threat that if they did not so opt, they would be involuntarily separated from employment. There may also be a pattern and practice of class-wide discrimination against older workers. All of the conduct described to support these allegations is in the context of the Lusardi private litigation challenging pre-March 1983 conduct. Our directed investigation and findings were made early in 1984. I could find no evidence presented to support a conclusion that anything unlawful had occurred at the time our findings were made and continuing to the present. There are a list of names of persons who were unable to opt into the private lawsuit and some general assertions that the employer presented the options in a manner detracting from their facial voluntariness. But no facts are presented, except for the list of names and two pieces of anecdotal evidence, enabling me to conclude that adequate proof exists to establish either individual violations or a pattern or practice of discrimination in violation of the Act since 1983 and continuing to the present time as alleged in the proposed complaint. This is particularly distressing given the three years since findings were made that this matter has been in headquarters. The Presentation Memorandum states at page 10, "The evidence reveals a deliberate Xerox policy to rid itself of its older workers, dating from 1982. We fully expect that during discovery we can obtain similar evidence regarding the post 1983 time period." We should have that information in hand now. Given our historic success in enforcing information requests through subpoena litigation, the asserted lack of cooperation on the part of Xerox in providing updated personnel data is not an adequate explanation. Indeed, in its July 23, 1986 letter, Xerox asserts that it had no knowledge, until then, that post 1984 conduct was forming the basis for the Commission's investigation and enforcement activity.

Although I agree with the theories under which this matter is proposed to be litigated, I cannot conclude that there are sufficient facts presented to support claims that Xerox has "willfully engaged in unlawful employment practices in violation of the Age Discrimination in Employment Act since April 1, 1983 and continuously up to the present time." I reluctantly decline to vote to authorize litigation in this matter in the manner proposed by the Office of General Counsel. I am deeply concerned with the possibility that there may be additional evidence which might support a number of individual cases, or perhaps even a pattern and practice of discrimination. If there is additional evidence which was not included in the presentation memorandum and which would establish such violations, I will be willing to move to reconsider this matter.

cc: Clarence Thomas, Chairman
R. Gaull Silberman, Vice Chairman
Tony E. Gallegos, Commissioner
Jim Troy, Director, Program Operations
Cynthia Clark Matthews, Executive Officer

April 3, 1987

Name
Address
City

United States Equal Employment Opportunity Commission v Xerox Corporation

Dear:

The Equal Employment Opportunity Commission has decided it will not initiate a lawsuit against the Xerox Corporation under the Age Discrimination in Employment Act (ADEA) in the above referenced charge. However, it is our understanding from the Lusardi attorneys that they are still seeking to incorporate your claim in the Lusardi v Xerox Corporation lawsuit, Civil Action number 83-809, in the United States District Court, Newark, New Jersey. We suggest that you make arrangements to contact them.

Thank you for your cooperation and assistance to the Commission during our administrative proceedings.

Sincerely,

James N. Finney
Associate General Counsel

[NOTE: THIS LETTER WAS FORWARDED TO EACH OF EEOC'S PROSPECTIVE PLAINTIFFS FOLLOWING THE COMMISSION'S VOTE OPPOSING THE OFFICE OF GENERAL COUNSEL'S RECOMMENDATION TO FILE A DIRECT LAWSUIT AGAINST THE XEROX CORPORATION FOR ALLEGEDLY HAVING VIOLATED THE AGE DISCRIMINATION IN EMPLOYMENT ACT.]

[NOTE: THE FOLLOWING IS A LISTING OF THE EEOC'S PROSPECTIVE PLAINTIFFS BY LAST NAME.]

Xerox Classmembers

Albertson	IRIF	9/30/83		Non exempt	
Baca	RIF	8/31/83		Non exempt	
Bartletta	RIF	7/30/84		Non exempt	
Barnes	Ret	1/27/84		Non exempt	USFIG
Bartell	VRIF(B)	6/30/83			
Barz	Ret				
Blankenship	Term	2/114/84			USFIG
Bovitz	VRIF(B)	6/30/83			
Brady	F resgn	12/21/83		Non Exempt	USFIG
Bronson (weak)	Resgn	1/4/85		Non Exempt	
Brown	F resgn	4/26/84			
Butler (C)	RIF	8/5/83		Non Exempt	
Cameron	VRIF	6/30/83			
Caselli	F Resgn	5/1/83	—①		
Caskey	IRIF	12/31/83			
Cayeaux	Resgn	6/83			
Chiecchi	Resgn	10/5/83			
Cometa	VRIF	10/83			
Deary	F Resgn	9/30/83		Non Exempt	
Drucker	Resgn	10/14/83		Non Exempt	
Flahevi	Resgn	6/84			
Fleishman	F Ret	1/13/84		Non Exempt	
Fox	Resgn	4/20/84			
Franck	Transfer to Loral	6/30/83			
Freckleton	VRIF	12/15/83			
Goff	IRIF Plant Cld	6/83	2		
Gosnell	Term	5/83			
Gravely	RIF	7/30/83		Non Exempt	
Hall	RIF Shugart	2/13/84	4		
Haug	RIF	5/30/83		Non Exempt	USIG
Hunter	RIF	6/2/83			
Karlsen	IRIF	7/11/83			
Luchette, R.	Term	5/27/83	3		
Mrowic, K.	Term	7/8/83			
Munoz, R.	RIF	6/11/83			
Oliveri, A	RIF	7/11/83			
Ossenford, T	VRIF	8/84			
Powers, P	Term	5/31/83	5		
Previde, W	VRIF (B)	1/16/84			
Rankin, R	F Resgn	1/16/84			
Scafetta, J	VRIF (B)	8/84			
Schubert C	VRIF (R)	12/1/83			
Simonelli, J	E Ret	7/11/83			
Thompson, R	F Ret	2/1/84			
Tortell, J	Transfer to Loral	6/30/83			
Tuzi, R	VRIF (B)	11/3/83			
Vito, A	VRIF (B)	12/15/83			
Watkins, W	F resgn	8/25/83			
Weiler, R	VRIF (B)	9/1/83			

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

April 9, 1987

Christina E. Clayton
Assistant General Counsel
Personnel and Environmental
  Health & Safety
Xerox Corporation
Office of General Counsel
P.O. Box 1600
Stamford, CT 06904

Dear Ms. Clayton:

The Commission has determined that it will not initiate a lawsuit against the Xerox Corporation under the Age Discrimination in Employment Act (ADEA). Accordingly, we will not proceed further with the processing of the case.

The fact that the Commission has terminated the processing of this matter does not certify that the Xerox Corporation is in compliance with the ADEA. Also, the decision not to initiate a lawsuit is not on the merits of the case and does not affect any aggrieved person pursuing their rights in a private lawsuit.

Very Truly,

James N. Finney
Associate General Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

JUN 30 1987

MEMORANDUM

TO: Clarence Thomas
Chairman

R. Gaull Silberman
Vice-Chairman

Tony E. Gallegos
Commissioner

Evan J. Kemp, Jr.
Commissioner

FROM: Charles A. Shanor CAS
General Counsel

SUBJECT: Response to Memorandum from Office Of Legal Counsel Concerning Cipriano v. Board of Education

In response to the General Counsel's prior recommendation for intervention in Cipriano, the Office of Legal Counsel presented three options for your consideration. Although we have addressed Legal Counsel's primary concerns in our proposed brief (attached), for the sake of clarity we now separately address each of the options presented.

1. In Option I, Legal Counsel analyzes the issues essentially as we do. Specifically, it states that, inasmuch as the court of appeals has already held that the plan violates §4(a)(1) and that it is a covered "employee benefit plan" within the meaning of §4(f)(2), the employer bears the burden of proving that the plan is not a subterfuge to evade the purposes of the Act. Legal Counsel agrees that under currently applicable agency regulations, "the employer can demonstrate lack of subterfuge generally only by showing 'that the lower level of benefits is justified by age-related cost considerations'. 29 C.F.R. 860.120(d)." It reiterates the view, taken in our original memorandum, that on the facts of Cipriano it is extremely unlikely that North Tonowanda could make that showing.

2. Option II, as set forth by Legal Counsel, follows the same analysis as Option I except that it views the incentive plan as integrated with the underlying plan instead of as a separate plan. Under Option II, Legal Counsel suggests that if the basic pension and early retirement benefits are combined, the benefits for older employees might be equal to or greater than those for younger employees and thus the plan might not violate §4(a)(1). We do not agree that such an argument could be made to the district court in this case because the facts contradict it. As explained at page 12 n.6 of our brief this incentive does not act to equalize benefits between older and younger employees. Under the underlying pension plan, a 60 and a 61 year old with equal years of service would get the same retirement benefits. With the incentive, however, the 60 year old would get an extra $10,000; the 61 year old would not.

Legal Counsel suggests further that, assuming §4(a)(1) is violated, the incentive could be viewed as integrated with the underlying plan for purposes of the §4(f)(2) analysis. Although we think that the incentive plan in this case probably should not be viewed as a coordinated plan or as a supplement to the underlying plan (see brief at 18 n.14),[1] we have assumed for the sake of argument that they were coordinated because the Second Circuit had so held, and we recognized that any argument to the district court must make that assumption. Even if the incentive and underlying plan are viewed as a package, North Tonowanda will almost certainly be unable to show any age-related cost justification for providing those age 55 to 60 with the "package", while providing those age 61 with only the benefits available from the underlying retirement plan. Viewing the plans as an integrated package, therefore, does not alter the result in this case.

3. In its third option, Legal Counsel submits that §4(a)(1) may not have been violated either because plaintiffs had an opportunity to choose the option and waived it, or because the incentive may be viewed as a salary replacement which compensates younger employees for giving up more years of salary. With respect to the waiver argument, Legal Counsel itself recognizes that older employees had less time to consider the option. Sixty year old employees had as little as nine months to decide while younger employees had up to five years to decide. Hence, there was age-based disparate treatment even in the amount of time the "window" was open. More importantly, as explained in our brief at n.5, the Second Circuit has foreclosed the argument put forth by Legal Counsel. It held that any "window" was immaterial to the employer's §4(a)(1) liability.

The argument, by analogy to Britt, that §4(a)(1) is not violated because the incentive is a salary replacement which compensates younger employees for more years of foregone salary, also is not viable.[2] As we have explained (brief at 14 n.7), an employer cannot accurately predict how much longer any particular individual would have worked. An incentive plan which hopes to compensate for foregone future earnings can only be based upon actuarial predictions of how long groups of people of varying ages are likely to work. Section 4(a)(1), however, like its Title VII counterpart, prohibits awarding unequal benefits to individual employees on the basis of actuarial predictions about the behavior of the group to which they belong.

In conclusion, our brief sets forth the arguments which this office believes should be presented to the district court in this case. The bulk of Legal Counsel's analysis as presented in their memorandum, seems basically consistent with our own.3/ Where there are points of departure, we have explained our disagreement in this memorandum.

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[1] Legal Counsel proposes that a lump sum early retirement incentive like this one could be considered to be an employee benefit plan as defined in §4(f)(2), despite the fact that the Commission has always taken the position that similar benefits, when labeled "severance pay", are not covered by §4(f)(2). See nn. 5&6 of Legal Counsel memorandum and our brief at 18 n.14. Legal Counsel contends that while the applicable regulations (29 C.F.R. §860.120(a)(1)) specify that certain ERISA covered employee benefit plans such as uninsured sick leave and paid vacation are not covered by §4(f)(2), there is no reason that early retirement incentives should not be covered. That argument overlooks the fact that the Interpretive Bulletin explains that §4(f)(2) does not apply to paid vacations and uninsured paid sick leave because age is not a significant factor in the design of such plans. 44 Fed. Reg. 30648, 30649 (1979). Accordingly, whether an incentive plan is covered by §4(f)(2) will turn on whether age is a significant factor in the design of the incentive or whether the incentive is so enmeshed with the underlying plan that it becomes part of the underlying plan.

[2] Britt did not involve any question of compensating employees for future foregone salary. The decision suggests only that the incentive in that case should be seen as a salary replacement for the time period it covers and that, since those receiving the incentive could be seen as salaried, the employer could refuse to simultaneously pay retirement benefits.

3/ Our brief is confined to the questions raised by the court in this case. We did not purport to resolve all issues concerning early retirement incentives because we agree with Legal Counsel that we should not attempt to do so in the context of one case. However, we are inclined to disagree with Legal Counsel's theory that the new section 4(i) will resolve all such questions. As we understand it, Legal Counsel's conclusion is based on sections 4(i)(4), 4(i)(6) and 4(i)(9).

Section 4(i)(4) provides that:

> compliance with . . . [§4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of [§4] relating to benefit accrual under such plan.

Section 4(i)(6) provides that:

> [a] plan shall not be treated as failing to meet the requirements of [§4(i)(1)(which prohibits cessation or reduction of benefit accruals or contributions to defined contribution accounts on account of age)] solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals."

Section 4(i)(9) provides that:

> for purposes of [4(i)] the term[] 'employee pension benefit plan'. . . ha[s] the meaning[] provided [it] in section 3 of [ERISA].

(emphasis added).

Section 4(i) was enacted to resolve the dispute concerning post-normal retirement age benefit accruals. It does not purport to resolve other pension questions. It seems to us that the plain language of the above sections makes clear that they pertain strictly to post-normal retirement age accruals and were not intended to be stretched beyond. After §4(i) goes into effect it may well be that in a particular case the accrual rules will affect the measurement of benefit amounts for employees and this may affect the assessment of whether benefits given are equal. That this would have to be taken into account certainly does not mean that §4(i) replaces §4(f)(2) for purposes of analyzing incentive cases. In any event, resolution of this issue is irrelevant to this case.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

JUN 30 1987

MEMORANDUM

TO : CLARENCE THOMAS
Chairman

R. GAULL SILBERMAN
Vice-Chairman

TONY E. GALLEGOS
Commissioner

EVAN J. KEMP, Jr.
Commissioner

FROM : Charles A. Shanor CAS
General Counsel

SUBJECT : Brief recommended for filing in Cipriano v. Board of Education

Attached are copies of the brief which this office proposes to file in the above referenced case. Also included is our response to the memorandum from Legal Counsel concerning the case. Legal Counsel's memorandum was forwarded to you with our first memorandum concerning Cipriano.

If you have any questions please contact me at 634-6400 or Dianna Johnston at 634-6150.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,
Plaintiffs,
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Intervenor,
v.
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA TEACHERS ASSOCIATION,
Defendants.

NO. 84-CV-80C

MEMORANDUM OF LAW FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INTRODUCTION AND SUMMARY

The issue in this case is whether defendants violated the Age Discrimination in Employment Act (ADEA) by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Court of Appeals for the

Second Circuit last year reversed this Court's entry of summary judgment for defendants and remanded the case for further proceedings. Cipriano v. Board of Education of the City School District of the City of North Tonawanda, 785 F. 2d 51 (2d Cir. 1986).

The court of appeals ruled, in the absence of factual dispute, that defendants' plan violated Section 4(a)(1) of the ADEA,[1/] because it withheld an employment-related benefit on the basis of age. 785 F. 2d at 53. On the question of whether the plan was nonetheless protected under Section 4(f) (2) of the ADEA,[2/] the court ruled that the plan was "bona fide" and was the type of "employee benefit plan" which the exception shelters. The only issue to be decided by this Court on remand is whether, in addition, the plan "is not a subterfuge to evade the purposes of th[e ADEA]" (Section 4(f) (2), 29 U.S.C. §623 (f)(2)). Relying on established Second Circuit case law, the court of appeals ruled that defendants bear the burden of proof on this issue. 785 F. 2d at 59.

In remanding the case, the court of appeals directed this Court to "seek the assistance of the EEOC" with respect to the meaning of the term "subterfuge" in Section 4(f)(2), and with respect to "the permissible means of structuring voluntary retirement plans." 785 F.2d at 59. This Court has accordingly requested that the Commission participate in the remand proceedings. In light of that request, and its role as the agency charged with interpretation and enforcement of the ADEA, the Commission has moved to intervene in this case in order to present its views on the issues now before the Court.

[1/] Section 4(a)(1), 29 U.S.C. §623(a)(1), provides that:

> It shall be unlawful for an employer--
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.

[2/] Section 4(f)(2), 29 U.S.C. §623(f)(2), provides in part that:

> It shall not be unlawful for an employer . . . or labor organization--
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act . . ..

First, based upon a review of the ADEA, its legislative history and administrative interpretations, the Commission believes that voluntary, early retirement incentives do not violate the ADEA. [3] Under established Supreme Court precedent, an incentive plan violates Section 4(a)(1) of the ADEA only where, as here, it deprives older workers of the incentive benefit on the basis of their age. There are various types of incentives--*e.g.*, a lump sum to all retirement-eligible employees irrespective of age, or extensions of pension benefits to younger employees--which do not collide with Section 4(a)(1) at all because they provide equal benefits.

Second, the Commission believes that plans which provide unequal benefits because of age are immunized from attack by Section 4(f)(2) where the disparity is justified by age-related cost considerations--*i.e.*, where the cost of providing the benefit increases directly as a function of age.

Applying these principles, the Commission believes that defendants will probably be unable to prove that their early retirement incentive plan is justified by age-related cost considerations. Withholding a fixed incentive bonus from employees beyond age 60 cannot be justified on the ground that the employees' age renders extension of the incentive to them more costly. Such a plan, therefore, reduces to a "subterfuge" because, without such cost justification, it denies them a benefit available to their younger colleagues.

BACKGROUND

Facts

Two retired teachers brought this ADEA action against their former employer, the Board of Education of the City School District of the City of North Tonawanda, New York (the School Board), and their union, the North Tonawanda Teachers Association (the Union). Plaintiffs alleged that, because of their age, they were discriminatorily denied an employment-related benefit which was given to younger workers. *Specifically*, plaintiffs challenged a provision of the 1980 collective bargaining agreement which offered a choice of two benefits to teachers age 55 to 60 who had completed 20 years of service and who agreed to retire between July 1 and February 1, in any of the three years (1980-83) covered by the agreement: (A) paid-up medical insurance premiums to age 65, plus $2000, plus $50 for each year of service beyond 20 years, or (B) a lump sum of $10,000. Plaintiffs were 61 years old on July 1, 1980, and were thus ineligible for this early retirement incentive plan (the plan) by its terms. They retired the following year, on June 30, 1981, and later filed this suit to recover the $10,000 they would have received under Option B if the plan had applied to them at the time of their retirement.

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[3] While Congress has made quite clear that involuntary retirement because of age is unlawful (*see* Section 4(f)(2), 29 U.S.C. §623(f)(2)), it is equally clear that Congress has not prohibited employees from voluntarily choosing retirement. *See Henn* v. *National Geographic*, ___ F.2d ___, 43 FEP Cases 1620 (7th cir. 1987). *See also Paolillo* v. *Dresser Industries*, No. 96-7705 (2d Cir. June 16, 1987) (by implication). Instead, a primary goal of the ADEA is "to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." 118 Cong. Rec. 7745 (1972) (remarks of Sen. Bentsen in introducing an amendment to extend the protection of the ADEA to government employees, quoting a Report of the White House Council on Aging).

Although not in evidence below, we understand--and it is undisputed--that the incentive was first offered to all pension-eligible teachers, regardless of age, in a previous collective bargaining agreement effective January 1979 to June 1980. However, teachers over age 60 had nine months (to September 30, 1979) within which to elect early retirement, while younger teachers had eighteen months (to June 30, 1980) to exercise the option. In any event, plaintiffs, who were 60 years old at the time, chose not to participate in this first incentive program. We also understand--and it is also undisputed--that the second plan established in 1980 remains in effect.

This Court entered summary judgment for defendants, holding that the §4(f)(2) exception applied. It concluded that the plan was "bona fide" and found "nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act." Finally, citing to Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), this Court concluded that the plan was consistent with what Congress "meant to" do in enacting the statute, viz., to prevent the forced discharge of older individuals while preserving early retirement incentives as "useful and necessary devices which employers can use to manage their work forces."

Court of Appeals Opinion

In the absence of any dispute, the court of appeals initially ruled that the incentive plan violated the Section 4(a)(1) prohibition against age-based discrimination in "compensation, terms, conditions or privileges of employment." 785 F.2d at 53-4. It then considered whether the Section 4(f)(2) exception applied.

First, it concluded that the incentive plan was a "bona fide employment benefit plan" within the meaning of Section 4(f)(2), because it paid substantial benefits to employees covered by it and should be "read as a supplement to [the] underlying general retirement plan for the purposes of §4(f)(2)." 785 F.2d at 54. The court reasoned that, because the special incentive simply increased retirement compensation and, "like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan." 785 F.2d at 56. The court pointed to Patterson v. Independent School District #709, 742 F.2d 465, as support for its holding, noting that Patterson had upheld an early retirement incentive under Section 4(f)(2) on the ground that it merely encouraged employees to activate the general pension plan, which was admittedly lawful, at an earlier age. 785 F.2d at 55.

In holding that the incentive plan was "a bona fide employee benefit plan," the court rejected plaintiffs' argument that Section 4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1), to include within Section 4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan--e.g., whether it offered a lump sum benefit before age 60 or one that tapered off by 60--goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

The court then turned to the question of whether the plan was "a subterfuge to evade the purposes" of the Act. Noting that Second Circuit case law assigns defendants the burden of proof on this issue, it held that these defendants had not sufficiently discharged that burden to justify dismissal without trial. However, the court was uncertain as to the nature of the proof Section 4(f)(2) requires in this context.

It pointed out that the "subterfuge" proviso had been litigated mainly in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option." 785 F.2d at 58. Nonetheless, it recognized that Congress (in its 1978 ADEA amendments banning involuntary retirement because of age) had left the "subterfuge" language in the statute, thereby requiring employers to show something more than that challenged benefit plans are bona fide. For this reason, and in light of the Department of Labor's Section 4(f)(2) interpretation (29 C.F.R. §860.120(a)(1)) requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations, the court held at minimum that the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 58. The court opined, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59. It remanded the case to allow this Court, with EEOC's assistance as amicus curiae or intervenor, to consider in the first instance the nature of proof which will discharge defendants' burden of proving the absence of subterfuge in cases such as this.

DISCUSSION

I. Application of Section 4(a)(1) to Early Retirement Incentives

1. As noted above at page 2, the court of appeals ruled that defendants' early retirement incentive plan violated the

Section 4(a)(1) prohibition against discrimination on the basis of age "with respect to an individual's compensation, terms, conditions or privileges of employment." That conclusion is firmly supported by Supreme Court precedent establishing that employers run afoul of Section 4(a)(1) if they subject older workers to treatment which, "but for" the employees' age, would be different. Trans World Airlines v. Thurston and EEOC, 469 U.S. 111, 120 (1985). Accord Geller v. Markham, 635 F.2d 1027, 1035 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981). Cf. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (Section 703(a)(1) in Title VII of the Civil Rights Act of 1964 violated where female employee provided different periodic retirement benefits "because of sex"); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(same).

The Commission argued in Thurston that, while the ADEA does not compel an employer to provide any particular benefits, the benefits that it chooses to provide cannot be withheld from older employees because of age. The Supreme Court agreed. Thurston, 469 U.S. at 121, citing Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)("benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free. . . .not to provide the benefit at all"). This is true whether or not participation in the plan is voluntary, because the Supreme Court has held that "the opportunity to participate in [an employee benefit] plan constitutes a 'condition[] or privilege[] of employment,' and that retirement benefits constitute a form of 'compensation.'" Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983)(emphasis added; citations and footnotes omitted). Section 4 (a)(1), like Section 703(a)(1) of Title VII,[4] "forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id. at 1081-82 n.10.

Thus, the first question in incentive cases is whether the challenged plan offers unequal benefits to employees on account of their ages. Incentive plans which make age-based distinctions in the amount of benefits violate Section 4(a)(1).

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[4] Section 4(a)(1) was derived in haec verba from Section 703(a)(1). Lorillard v. Pons, 434 U.S. 575, 577 (1978).

2. The North Tonawanda defendants conceded that their plan provides unequal benefits in violation of Section 4(a)(1) of the ADEA. [5] The plan provides for a substantial financial benefit ($10,000, or cash plus health insurance premiums) to be paid to employees age 55 to 60 who are otherwise eligible for early retirement and who volunteer to leave the work force. After employees reach the age of 61 they are deprived of that benefit. Thus, employees age 61 and over are treated differently from similarly-situated younger employees because of their age; the plan on its face violates Section 4(a)(1) because, "but for" their age, retirement eligible employees over age 60 would be entitled to the incentive when they retired. [6]

3. Although North Tonawanda's plan violates Section 4(a)(1), incentive plans can be, and often are, structured so that they do not. The court's request for suggestions as to lawful means of structuring incentives can probably best be answered by providing a few examples of such plans already in use which provide equal benefits. The ensuing discussion, not intended to be an exhaustive recitation of specific plans, provides some broad prototypes which do not violate §4(a)(1). Section 4(a)(1) does not render retirement incentives generally unlawful; nor does it unreasonably restrict employer options.

First, the employer could simply offer a flat incentive--a lump sum or cash times years of service and/or paid up insurance premiums--to all retirement eligible employees regardless of age and under the same conditions. For example, the International Longshoreman's Association and Port of Baltimore Management officials offered all longshoremen with 25 years of service a lump sum. "Dockworkers to Get Deal to Retire," Washington Post, Dec. 19, 1986.

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[5] In the court of appeals they did assert that it somehow makes a difference that all employees, including plaintiffs, had a right to take the incentive if they retired by June 30, 1980. (See supra at 6). Although the terms of this "window" provision were not in the record before the Second Circuit, the court held that any such "window" was immaterial to defendants' Section 4(a)(1) liability, because "[plaintiffs'] claim [was] not that they were denied the opportunity ever to participate in the incentive plan, but that they were denied the opportunity on the date they ultimately chose to retire." 785 F.2d at n.2. Thus, it is the law of the case, binding on this court, that the fact that employees once had the option of taking the incentive is not a defense.

[6] There can be no argument in this case that the plan does provide equal benefits and that the incentive merely compensates younger workers for the benefit reductions that usually accompany early retirement (see discussion infra at 13). In New York, the usual retirement age is 60; thus, under this plan the 60 year old gets full benefits plus $10,000 while the 61 year old gets only the retirement benefits.

Another typical and lawful retirement incentive involves lowering the age at which actuarially unreduced benefits are available in a defined benefit plan. A commonly used formula for determining benefits is [final average salary] x [a fraction of salary (usually at least 1.5%)] x [years of service] x [1 (at normal retirement age; typically 65)]. Under such plans employees can usually retire a few years before normal retirement age but the final factor of [1] will be reduced for each year short of normal retirement age, so that if one retires at age 55, the formula will be something like: [final salary] x [a percentage (1.5%)] x [years of service] x [.363]. To encourage early retirement, employers may offer to drop the actuarial reduction for all those otherwise eligible for early retirement. In this way, the employer is not providing unequal benefits on the basis of age. Rather, each retirement eligible employee's pension will be calculated on the basis of salary and years of service. Thus, a 65-year-old employee with a $40,000 final annual salary and 20 years of service will receive the same periodic pension benefit as a 55-year-old with the same pay and years of service.

It may be argued that removing the actuarial reduction for the younger worker leads to unequal benefits because the actuarial value of the benefit will be greater for younger employees as a group than for the older employees as a group. The focus of Section 4(a)(1), however, like its Title VII counterpart (Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1)), is on the individual, not on the group. Arizona Governing Committee v. Norris, 463 U.S. at 1073 (1983); Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708 (1979). Hence, actuarial predictions of value--even though they may be accurate for the group--are not pertinent to whether Section 4(a)(1) is violated. Manhart, 432 U.S. at 710 n.20 (impact on group irrelevant, retiree's total pension benefit depends on his or her actual life span; emphasis in original). Rather, the question is whether each employee receives equal ascertainable benefits irrespective of age.[7] If all the eligible employees receive equal monthly benefits for life, they are not being treated differently because of age.[8] See id. at 711-12. Cf., Dorsch v. L.B. Foster Co., 782 F. 2d 1421, 1427 (7th Cir. 1986) (employer did not violate Section 4(a)(1) where its early retirement plan gave equal monthly benefits to every employee whose age and years of service totalled 75, even though the total benefit was larger for younger than older employees because younger employees were expected to draw the benefit for a longer period of time).[9] In short, where the incentive merely amends the underlying benefit plan so that all retirees receive an equal periodic benefit for life, it does not violate §4(a)(1).[10/]

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[7] For this reason, we believe that it would be incorrect to argue that § 4(a)(1) is not violated because the incentive is a salary replacement (see Britt v. E. I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985)), which should be greater for younger workers who are potentially foregoing greater future earnings. The future work pattern of any individual is entirely speculative. Manhart and Norris make it clear that projections about the probable life or working life of the group cannot justify unequal benefits under § 4(a)(1). Britt itself does not purport to support any such argument. It held only that the employer did not violate § 4(a)(1) when it declined to allow employees to draw the incentive and retirement benefits simultaneously.

[8] By "equal benefits," we mean an equal fraction of salary times years of service. The same analysis would apply to incentive plans for which the underlying retirement plan prescribes a fixed monthly amount for all employees of a given age and length of service. If the employer simply lowers the age at which the benefit is available, Section 4(a)(1) is not violated.

[9] We caution, however, that we think the Dorsch court's analysis is flawed. In that case, the employer offered $600 per month to eligible employees until they reached age 62. The case did not involve a lifetime annuity which would have made the total value of the benefit to any individual unascertainable. Instead, because of the age 62 cutoff, the total value of the benefit to any given individual could be determined; the older individual received a smaller benefit. Thus, the Dorsch court probably erred in finding no violation of Section 4(a)(1). See also, Potenze v. New York Shipping Ass'n, 804 F.2d 235 (2nd Cir. 1986)(a plan which make distinctions among recipients on the basis of age violates Section 4(a)(1)).

Nevertheless, in stressing the importance of periodic rather than total value, we think the Dorsch court may have implicitly recognized that the periodic benefit is the appropriate comparison when the total value to the individual is ascertainable only by reference to actuarial assumptions, as in Norris and Manhart. See supra at 14.

A third incentive used by employers gives extra age and service credits--frequently five years--to each employee.[11/] Because virtually all plans have a minimum age and service requirement for pension eligibility, this increases the number of employees eligible for retirement. It also makes some employees eligible for actuarially unreduced benefits; for example, if normal retirement age is 65, a 60-year-old receives actuarially unreduced benefits. Finally, in the typical defined benefit plan, described above, in which years of service are part of the calculation of benefit amount, this incentive increases the periodic benefit of every employee. If every employee is given the add-on, there is no disparate treatment on the basis of age. Some employees will become eligible for early or full benefits who were not previously eligible. Such an expansion of the group eligible for retirement does not deprive the older worker of a benefit, and is lawful under Section 4(a)(1).[12/]

[10/] It might be argued that incentives by definition give something extra to younger workers that the older employees have already earned--here, for example, a vested interest in a pension benefit of a certain amount. We disagree. Employers can always extend a benefit to larger groups of employees without having discriminated against those who already have the benefit. For example, if an employer offered college tuition to all management trainees with eight years of service and later extended the benefit to all management trainees, we do not think there is a serious argument that the value of the benefit to the trainees who already have eight years service has been diminished.

Furthermore, such an argument seems to assume that pension benefits are purely a reward for service. They are not. They are also viewed as a deferred wage or an income stream to provide for loss of income upon retirement. E. Allen, Jr., J. Melone, and J. Rosenbloom, "Pension Planning" 2-7, 33 (5th ed. 1984). Pensions are not solely a reward for service: one cannot draw on them at all until a certain age; some minimum amount can be drawn after a miniscule service period; there is a significant actuarial reduction for those who retire before the "normal retirement age" and they are often payable at least until death whether one lives 10 or 40 years after retirement.

In short, pension benefits, in their role as income replacement, make it possible for eligible employees to choose retirement. We do not think that an older employee is deprived of a benefit when an employer simply makes it possible for more employees to choose retirement.

[11/] Both IBM and Xerox have recently offered five year age and service add-ons. Daily Labor Report (BNA), Dec. 19, 1986, A-9.

[12/] Some employers limit add-ons by, for example, limiting total service credits. This brief cannot analyze the many variations which exist.

In sum, many early retirement incentives already in use by major companies do not violate Section 4(a)(1) of the ADEA.

II. Application Of The Section 4(f)(2) Exemption To Early Retirement Incentives

Exceptions to the Section 4(a)(1) prohibitions against discrimination are to be narrowly construed.[13] To establish the Section 4(f)(2) defense the employer must show: 1) there is a bona fide employee benefit plan; 2) the action was taken in observance of its terms; and 3) the plan is not a subterfuge to evade the purposes of the Act. United Airlines v. McMann, 434 U.S. 192, 198 (1977).

The court of appeals in this case ruled that the School Board and Union were "observing the terms" of their incentive plan. We agree, and believe that this will seldom be a disputed issue in litigation attacking retirement incentives.

The court of appeals also ruled that the incentive plan was a "bona fide employee benefit plan" within the meaning of Section 4(f)(2) because it paid substantial benefits, was "functionally related" to the underlying retirement plan, and involved significant cost considerations (see supra at 7-8).[14]

Finally, the court ruled that the School Board and the union must nonetheless prove that their actions were not a "subterfuge" by showing "a legitimate business reason for structuring the plan as [they] did" (see supra at 9-10). It added that this court should seek the Commission's guidance concerning the meaning of subterfuge as applied to the ADEA as amended in 1978.

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[13] Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 469 U.S. 832 (1982); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 766 (1977).

[14] Although an argument might be made that this kind of lump sum plan is not the kind of plan Congress intended to cover under §4(f)(2), but is more analogous to the kinds of benefits held to be outside that section's purview in EEOC v. Bordens, 724 F.2d 1390 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 105 S. Ct. 92 (1984), and Alford v. City of Lubbock, 664 F.2d 1272 (5th Cir.), cert. denied, 456 U.S. 975 (1982), that issue has been resolved here by the Second Circuit's ruling.

A. "Subterfuge" In The Context of Early Retirement Incentives

Even if an early retirement plan qualifies generically for the shelter of Section 4(f)(2), the employer must prove that the plan as structured is not a "subterfuge to evade the purposes of the Act." A "subterfuge" is a "scheme, plan, stratagem or artifice of evasion." Potenze v. New York Shipping Assn., 864 F.2d 235, 238 (2d Cir. 1986), citing United Airlines v. McMann, 434 U.S. 192, 203 (1977). The Second Circuit has ruled that the employer bears the burden of proving lack of intent to evade the purposes of the ADEA. EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). Accord, EEOC v. Eastern Airlines, ___ F.2d ___, 27 FEP Cases 1686, 1689 (5th Cir. 1980).

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers. See Section 2(b), 29 U.S.C. §621(b). Where the employer has set up or amended a benefit plan after passage of the ADEA to the disadvantage of older employees, it must prove that its action was prompted by legitimate, nondiscriminatory business reasons. EEOC v. Home Insurance Co., 672 F.2d at 260 n.11; EEOC v. Baltimore & Ohio Railway Co., 632 F.2d 1113 (4th Cir. 1981); EEOC v. Eastern Airlines, 27 FEP Cases at 1689; Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980). Both EEOC regulations [15] and congressional intent concerning Section 4(f)(2) indicate that there is only one legitimate reason for providing smaller benefits to older workers: the cost of providing the benefit increases because of age. See EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 224-25 (3d Cir. 1983).

The 1967 Congress recognized that the cost of providing certain employment benefits increases with age. Senator Javits proposed the amendment which became Section 4(f)(2) in order to provide employers with the "flexibility" to make necessary distinctions based on age so as to ensure that employers would not be discouraged from hiring older workers because of the increased costs associated with providing benefits to them. *Hearings on S. 830 before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong., 1st Sess., 27 (1967); *See also* *EEOC* v. *Borden's, Inc*., 724 F.2d at 1396. Senator Javits explained:

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[15] The Department of Labor in 1979 promulgated regulations concerning employee benefit plans (44 Fed. Reg. 30648) which were continued in effect by the EEOC when ADEA enforcement authority was transferred to the Commission. 44 Fed. Reg. §66799 (1979); 46 Fed. Reg. 47724 (1981).

> The amendment relating to . . . employee benefit plans is particularly significant. Because of it *an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits* as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers*, actually be discouraged from hiring older workers. At the same time it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

113 Cong. Rec. 31254-55 (1967)(emphasis added). The floor manager of the bill, Senator Yarborough, elaborated on the §4(f)(2) exemption, saying that older workers would not be denied employment but their rights to "full consideration" in pension plans would be limited. 113 Cong. Rec. 31255 (1979). [16]

In 1969, the Department of Labor, then charged with administering the Act, published an interpretation specifically stating that Section 4(f)(2) applied to employee benefit plans which involved age-related cost considerations. 29 C.F.R. §860.120, 34 Fed. Reg. 9709 (June 21, 1969):

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

In considering amendments to the ADEA in 1978, Senator Javits explicitly approved the government's interpretation, saying:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions

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[16] The views of Senators Javits and Yarborough, as sponsors of the legislation, are entitled to substantial weight in interpreting the statute. *FEA* v. *Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976).

> for older and younger workers. *Thus a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*

124 Cong. Rec. 8212 (emphasis added). *See also* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 ("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age based variations in benefits where the cost of providing benefits to older workers is substantially higher").

After thus indicating agreement with the Labor Department's interpretation of Section 4(f)(2), Congress left the section unchanged except for an amendment specifying that the exemption did not permit involuntary retirement. It also asked the Secretary of Labor to issue more comprehensive guidelines.[17]

Accordingly, in 1979, the Labor Department issued an amended Interpretative Bulletin on Employee Benefit Plans (IB), 29 C.F.R. §860.120, 44 Fed. Reg. 30648 (May 25, 1979) which elaborated upon the age-related cost principle previously enunicated by the Department and endorsed by Congress. 29 C.F.R. §860.120(a)(1). These regulations specify that a plan which prescribes lower benefits for older employees is "not a subterfuge within the meaning of section 4(f)(2), provided that the lower level benefits is justified by age-related cost considerations." 29 C.F.R. §860.120(d). [18] The Bulletin permitted a few exceptions to the "equal cost" principle which, *inter alia*, allowed employers to include medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. §860.120 (f)(ii)(A) and (f)(iv)(A).

Congress has twice amended the ADEA since publication of the 1979 Interpretative Bulletin ("IB"). In 1982, Congress amended the ADEA to disallow the medicare exception. Section 4(g) of the ADEA, Pub. L. 97-248, §116. *See also* S. Rep. 97-494, 97th Cong., 2d. Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 792-93. Last year, Congress amended the statute to require pension benefit accruals beyond normal retirement age. Section 4(i) of the ADEA, Pub. L. 99-509 §9201; H. Conf. Rep. No. 99-1012, 99th Cong. 2d Sess. 374, 378, *reprinted in*, Dec. 1986, U.S. Code Cong. & Admin. News 4019, 4023.

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[17] *See* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978); *remarks* of Senators Williams and Javits, 124 Cong. Rec. 8219 (1978) ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefits plans, and the Secretary is urged to act as soon as possible.").

[18] The regulations make clear that this is the only way to prove lack of subterfuge and that the only exceptions permitted are those spelled out in the IB itself. Immediately following the language quoted here, the IB states that "[the only exception to this general rule is . . . [as specified in paragraph (f)(4) below]]."

The significance of these Congressional actions is that Section 4(f)(2) was left intact, together with the regulations' "equal cost" interpretation, after Congress indicated that it was familiar with the specific provisions of the IB. Indeed, Congress acted to abolish some of the exceptions to the equal cost requirement contained in the IB. Under established principles of statutory construction, such activity supports the conclusion that Congress has reviewed and approved the position that §4(f)(2) allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age.[19]

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[19] *Andrus* v. *Allard* 444 U.S. 51, 57 (1979) ("particularly relevant" that Congress has twice reviewed and amended the statute without rejecting the enforcing agency's view); *U.S.* v. *Rutherford*, 442 U.S. 544, 553-54 and n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention . . . of Congress and [it] has not sought to alter the interpretation although it amended the statute in other respects, then presumably the legislative intent has been fully discerned"); *U.S.* v. *Correll*, 389 U.S. 299, 305-06 (1967)("longstanding federal regulations and interpretations applying to unamended or reenacted statutes are deemed to have received Congressional approval and have the effect of law"); *U.S.* v. *Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908)(where meaning of statute in doubt great weight given to construction by department charged with execution of the statute, and reenactment by Congress, without change, of a statute which has received long continued executive construction, is an adoption by Congress of such construction). *See also EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (Congress' silence during the many years a Commission regulation was extant suggests its consent to the Commission's practice).

B. "Subterfuge" In This Litigation

1. The court of appeals recognized that defendants in this case offered no proof on the issue of subterfuge and, therefore, that they did not qualify for the Section 4(f)(2) exception under the traditional analysis of United Airlines v. McMann, 434 U.S. 192 (1977), and its own decision in EEOC v. Home Insurance Co., 672 F.2d 252 (2nd Cir. 1982). Nonetheless, the Court expressed doubt that the same analysis should apply to a case involving early retirement incentives, evidencing confusion about the role of "voluntariness." On the one hand, it opined that the requisite evidence of business reasons in the context of voluntary early retirement incentives "would almost necessarily be less than what is required to make a showing in the case of a mandatory plan," because the older employee is not being tricked or coerced into leaving the workforce but "is being deprived only of the same opportunity to receive a bonus for early retirement as is accorded [younger] workers." 785 F.2d at 59. On the other, it recognized that such reasoning would virtually read the subterfuge language out of Section 4(f)(2) in regard to voluntary early retirement plans and that such result is inconsistent with the fact that Congress in 1978 left the subterfuge language intact at the same time that it specifically barred mandatory retirement. 785 F.2d at 58. Accordingly, the Court remanded the case to this court with instructions to seek the EEOC's assistance with respect to the meaning of subterfuge.

2. To the extent that the court of appeals thought "voluntariness" or lack of coercion to retire altered the appropriate legal analysis, we believe the court confused issues which sometimes coexist in retirement incentive cases and misconceived "the purposes of the Act."

The voluntariness of a plan is pertinent ~~to~~ any claim that employees have, in fact, illegally been coerced into retirement. See Henn v. National Geographic Society, ___ F.2d ___, 43 FEP Cases 1620 (7th Cir. 1987); Paolillo v. Dresser Industries, No. 86-7705 (2d Cir. June 16, 1987). Voluntariness may also be a defense if the issue is whether the incentive is a pretext to get rid of older workers who are eligible for it. In the pretext area, however, the issue is not whether the mere existence of the plan is a subterfuge or whether the retirements of those age 55-60 were in fact voluntary. Rather, the issue is whether the plan's structure--one lump sum to everybody 55-60, nothing to those 61 and over--is a subterfuge. The older employees' exclusion from the benefit is not voluntary; hence, the fact that younger employees can choose whether or not to retire has no bearing on older employees' claims here.[20]

By its statement that this incentive does not deprive an employee of "continuation of his job," but "only of the same opportunity to receive a bonus" (785 F.2d at 59), the Court appears to suggest that the purpose of the ADEA is only to bar discriminatory hiring and discharge and, therefore, a voluntary incentive plan which compels neither cannot be a "subterfuge." However, as noted above, the stated purpose of the Act is not only "to promote the employment of older persons based on their ability rather than age" but also "to prohibit arbitrary age discrimination in employment and to help employees and workers find ways of meeting problems arising from the impact of age on employment." Section 2(b), 29 U.S.C. §621(b). Congress declared it unlawful to discriminate not only in hiring and discharge, but also with respect to "compensation, terms, conditions or privileges of employment" (Section 4(a)(1)). Accordingly, Congress' purpose was not only to end discriminatory hiring and termination, but also to require employers to provide equal compensation and benefits.

For this reason, we believe that the employer who compensates an older worker less than a similarly-situated younger worker pursuant to an incentive plan bears a burden of justifying its actions which is no lighter than the burden of justifying any other form of discrimination. For the reasons explained above, that burden is to prove that the benefit was reduced because the cost of providing it increases as a function of age.

3. On these facts, it is singularly unlikely that defendants can make such a showing since they are providing the same $10,000

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[20] As discussed *supra* at 11 n.5, the fact that plaintiffs at one time had the option does not alter the fact that they do not have it now and younger employees do.

lump sum to everybody age 55-60 and nothing to those over 60.21/ Under our analysis, then, unless North Tonawanda can demonstrate age related cost considerations, its plan is a subterfuge to evade the Act's purpose of eradicating arbitrary age discrimination. For this reason alone, the §4(f)(2) defense is not available here.

In addition, there is indication in this record that the motive in structuring the plan this way was, in fact, to discourage teachers from working beyond age 60. 22/ Withholding benefit or privilege of employment for this purpose is

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21/ In this respect this plan differs from a "sliding scale" plan. Such a plan is, typically, one in which the incentive is reduced by steps as the employee advances in age. The incentive may be greatest at the age when the employee is first eligible for early retirement, and may be entirely eliminated when the employee attains the "normal retirement age" specified in the regular pension plan (generally age 65). To the extent that such a plan compensates those below normal retirement age for the actuarial reduction they would otherwise suffer under their underlying retirement plan, it probably would not violate §4(a)(1). *See supra* at 13-14.

A "sliding scale" might also be tied to an actuarial assumption about working life expectancy. For example, if all employees had a working life expectancy of age 65, an employer might determine that it would take $20,000 to induce most 55 year olds to retire, but progressively less for each year until age 65 when most people will retire even without receiving an incentive. Although projections about the working-life expectancy of older employees clearly cannot justify unequal benefits under Section 4(a)(1) (*see* discussion *supra* at 14 n.7) they arguably could be used to prove the absence of "subterfuge" under §4(f)(2). Assuming that such an argument is valid, it would remain the employer's burden to show that it incurred equal costs in providing the incentive to all employees, regardless of age. That question need not be settled here, however; on the facts of this case there is simply no correlation between age and monies expended.

22/ The School Board argued in the appellate court (Bd. br. at 8) that it wanted to eliminate veteran teacher's who had the higher salaries.

The brief of the New York Association of School Boards contains a thinly veiled threat targeted exclusively at workers over age 60:

> In New York, the mandatory retirement ages for teachers. . . .were abolished in 1984. . . .[and] [i]f the plaintiffs succeed in this case, the result will be either that *elderly public employees may be separated for cause under decidedly unpleasant circumstances or they may retire earlier without any bonus*.

Rather then engaging in an analysis of teacher productivity versus cost of employment for teachers regardless of age, the Association targeted its threats of separation and its related denial of a retirement bonus exclusively at those teachers over age 60. Such conduct surely does not further Congress' purpose to promote employment of older workers. Section 2(b), 29 U.S.C. §621(b).

clearly a "subterfuge to evade the purposes of the Act." 23/

4. The defendants and this court previously relied on Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), to validate the plan here. We respectfully suggest that such reliance was misplaced.

Mason has no bearing on the issues presented here. It involved a challenge to the federal employee program for early retirement at times of reductions in force. The challenge was lodged by an employee who was under the floor for eligibility and who argued that the applicable retirement provisions were repealed by the ADEA.24/ The court simply held that the mere existence of a voluntary incentive plan which did not force retirement was not a subterfuge, a proposition with which we agree. As noted above, the issue here is that the employer is offering an unequal incentive, an issue not addressed in Mason.

Patterson, on the other hand, is relevant because the court upheld a "sliding scale" incentive. The court's analysis, however, is difficult to follow. On the one hand, the court recognized that to fit within Section 4(f)(2) a plan must be "a systematic interrelated structure where consideration of age is an actuarial necessity." On the other, it proceeded to hold, essentially, that a voluntary plan is immune from scrutiny. It did not analyze the meaning of "subterfuge" but, instead, reasoned that since the Supreme Court in United Airlines v. McMann, 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, "a voluntary plan is *a fortiori* permissible".

23/ To the extent that employers extend a benefit to induce voluntary retirement, their motives are not particularly relevant and beneficiaries of the offer could not claim a violation of the Act. Here, however, the act complained of was not the extension, but the withholding, of a benefit for the purpose of discouraging the employment of all those over age 60.

24/ In reduction-in-force situations, federal law simply lowers the number of years of service and age at which one becomes retirement eligible. 5 U.S.C. §8336(d).

Patterson failed to recognize that the McMann plan was upheld on the ground that it was established before the ADEA was enacted and, therefore, could not have been a "subterfuge to evade the purposes of the Act." The Patterson plan was instituted after the passage of the ADEA. Moreover, McMann was overruled by the 1978 amendments in which Congress made clear that involuntary retirements were unlawful. The Patterson court neither mentioned nor addressed the effect of the amendments.

CONCLUSION

This Court should analyze the legality of defendants' early retirement incentive plan in a way that comes to grips with the statute's clear prohibition against age discrimination. In so doing, and for the reasons stated above, this Court should conclude that there are incentive plans which do not run afoul of the ADEA's §4(a)(1) prohibitions, but that if a plan provides unequal benefits to employees based on age it is not protected under § 4(f)(2) unless the employer demonstrates that the cost of providing the benefit increases as age increases.

Respectfully submitted,

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL -6 1987

MEMORANDUM

TO : Charles A. Shanor
General Counsel

FROM : Richard D. Komer Richard D. Komer
Legal Counsel

SUBJECT : Cipriano v. Board of Education

We have reviewed your Office's brief and memorandum to the Commission regarding Cipriano. In addition to our memorandum of March 3, 1987, we offer the following comments.

1. We believe the brief should address the section 4(i) issue in a footnote, to alert the court to the question of its possible future applicability to early retirement incentives. Given that possibility, the Office of Legal Counsel does not believe this a propitious time for an expansive decision on such incentives under section 4(f)(2); an awareness of section 4(i) may induce the court to frame a narrow decision.

2. We recommend deletion of the footnote on the Dorsch case (n. 9 at p. 15). The complex issues raised by the footnote need not be addressed or characterized in the context of this case. The Commission should retain the widest possible latitude to formulate policy on retirement incentive issues that are not necessary to a decision in this case.

3. Since the Second Circuit's ruling has resolved the question of whether the incentive is a section 4(f)(2) plan, we recommend that footnote 14, at p. 18, be deleted.

4. In footnote 18, at p. 23, the brief quotes an exception to the general equal cost rules, citing "paragraph (f)(4)." Since the meaning of that paragraph (actually paragraph (f)(1)(iv)) dealing with pension plans is uncertain, we recommend its deletion. (See n.4 at p. 3, of our March 3, 1987 memorandum.)

5. At some point in your "equal cost" analysis, perhaps it should be noted that the I.B., at 29 C.F.R. § 860.120(d)(3), permits the use of 5-year age brackets for such analysis. We believe the court should be made aware that an employer is entitled to compare, for example, the average costs for the 56-60 age group with the 61-65 age group.

6. In the brief, at p. 29, you state that the section 4(f)(2) defense "is not available here." We recommend changing the sentence to say that the 4(f)(2) defense, although available, "cannot succeed."

7. We recommend deleting footnotes 22 and 23 and the related discussion in the text (pp. 29-30). The case does not involve the coerced retirement of any person offered the incentives, and it is difficult to conceptualize how withholding an "incentive to retire" from persons over age 60 can at the same time be characterized as "discouraging the employment" of those same persons.

8. In your June 30, 1987 memorandum, n. 3 at p. 4, you state that section 4(i) appears to pertain "strictly to post-normal retirement age accruals." In fact, section 4(i) does not contain such a limitation and would apply to 40 year olds as well as to 66 year olds.

9. Finally, as noted in our March 3, 1987 memorandum, we suggest that the court be urged to limit the holding of the case to the peculiar facts before it, and that the court not try to set wide-ranging policy on early retirement incentives at this time. The brief should similarly be limited.

We will be pleased to join with you in any briefing of the Commissioners that may be requested. At the request of one of the Commissioners' Offices, we are providing copies of this memorandum to the Commissioners.

cc: EEOC Commissioners

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

MAR -3 1987

MEMORANDUM

TO : William H. Ng
Deputy General Counsel

FROM : Richard D. Komer Richard D. Komer
Acting Legal Counsel

SUBJECT : Cipriano v. Board of Education

We have reviewed your office's memorandum to the Commission regarding the Cipriano early retirement incentive (ERI). As we have discussed, we are outlining in this memorandum additional issues and options that we believe should be brought to the Commission's attention. It is our understanding that this memorandum will be attached to your action memorandum for transmittal to the Commission. Because of the time constraints involved, we are attempting to highlight the pertinent issues rather than to provide an exhaustive analysis.

I. Choice of Action

Your office recommends that the Commission intervene in the District Court case, as requested by the District Court Judge. The Commission should consider providing a document to the court which is narrow in scope for the following reasons: First, the 1986 ADEA amendments in the Omnibus Budget Reconciliation Act, H.R. 5300, which added section 4(i) to the ADEA, will have a significant impact upon the ERI issue. It is our view that after the effective date of section 4(i), generally in 1988, benefits under an ERI would be covered under section 4(i) rather than under section 4(f)(2). Assuming our view is correct, an ERI rule promulgated under section 4(f)(2) would have a very short lifespan. The Commission may prefer that any action in the Cipriano case, under section 4(f)(2), be narrowly focused rather than wide-ranging.

Secondly, as you are aware, the Commission has been considering a draft ERI Opinion Letter requested by the Michigan Education Association.

Finally, considering the peculiar facts of the Cipriano case, as outlined in your memorandum, and considering that Judge Friendly's opinion has locked the District Court into several key legal positions (i.e., that the plan violated section 4(a)(1), that the plan potentially is eligible for the section 4(f)(2) exception), this case might not be the most appropriate forum for setting overall policy. Rather, an Opinion Letter (or a Policy Statement) might present a more workable medium for establishing such policy. 1/

II. Legal Analysis

In our view, there are three primary legal theories under which the Cipriano plan could be analyzed.

A. Option I

As indicated in your memorandum, one could determine that the ERI was "not so closely related to the retirement plan as to be swept into section 4(f)(2)'s coverage." General Counsel Memo, at p. 27. 2/ Such a position could be viewed as consistent with prior Commission positions in such cases as Westinghouse and Borden's. (Those cases, however, did not involve retirement incentives but rather severance pay after plant closings.)

1/ Indeed, the Commission may wish to participate as amicus, rather than as an intervenor, so that we would not be so closely bound to the "law of the case."

2/ While the Court of Appeals determined that the ERI was a section 4(f)(2) plan, such finding may still be open to challenge.

Under this approach, the analysis would be limited to determining whether or not the ERI violated the provisions of section 4(a)(1). In *Cipriano*, the Court of Appeals has already determined that such a violation has occurred. 3/ Under Option I, the inquiry would thus cease after the finding of a 4(a)(1) violation since the 4(f)(2) defense would be unavailable.

Assuming, however, that the District Court will follow the direction of the Court of Appeals in holding the ERI to be a section 4(f)(2) plan, the employer would have the burden of showing that the disadvantageous treatment of older employees was not a subterfuge to evade the purposes of the Act. With respect to most employee benefit plans, the employer can demonstrate lack of subterfuge generally only by showing "that the lower level of benefits for older persons is justified by age-related cost considerations." 29 C.F.R. 860.120(d). 4/ It is extremely unlikely that the employer in *Cipriano* could make such a showing.

B. Option II

A second alternative would be to analyze the ERI and the underlying pension plan as a unit, rather than as two discrete plans. This option is consistent with the Circuit Court opinion which found the ERI to be a "supplement" to the main pension plan. 5/ The Court would analyze the case in the same way as under Option I, except that the plan at issue would be the pension plan/ERI combination, not just the ERI standing alone. The Court would combine the benefits available in the ERI and pension plan for purposes of the section 4(a)(1) analysis. Thus, while the ERI alone might provide greater benefits for younger employees than for older employees, a section 4(a)(1) violation, the ERI plus the pension benefit might provide equal or greater benefits for the older employees and the combination could be in compliance with section 4(a)(1). 6/ Under Option II, we would argue that a section 4(f)(2) analysis would be appropriate should a section 4(a)(1) violation be shown, even had the Court of Appeals not already stated that section 4(f)(2) is applicable.

3/ But see Option III for a contrasting viewpoint.

4/ The next sentence of that section reads: "The only exception to this general rule is with respect to certain retirement plans." The exception, while not completely clear, seems to indicate that "age-related cost considerations" can *never* be a justification for the lowering of pension benefits for employees who have not attained normal-retirement age. Such a reading of the regulation would be inconsistent with the reading of section 4(f)(2) taken by the Commission in the 1979-1986 post-normal retirement age benefit accrual rules project.

5/ In *Westinghouse*, the court refused to compare pension benefits to non-pension (severance) benefits, considering the two benefits to be unrelated in substance. Such view is supported by 29 C.F.R. 860.120(f)(2), which states that a pension benefit and a non-pension benefit cannot be compared, for section 4(f)(2) purposes, as a "benefit package." However, there is no reason provided in the regulation why two *pension* benefits cannot be compared, or combined.

6/ The ERI, under the ERISA definition, would be a pension plan. Section 3(2)(A) of ERISA. While the Department of Labor carved out such ERISA employee benefit plans as sick leave or vacation pay plans from the section 4(f)(2) definition of "employee benefit plans," there does not seem to be any such justification for removing ERI's from the section 4(f)(2) definition.

C. Option III

In Options I and II, it was assumed that since the Cipriano plan paid lower benefits to retiring employees over the age of 60 than to retiring employees between the ages of 55 and 60, a section 4(a)(1) violation existed. In this Option, however, we consider alternative theories under which no section 4(a)(1) violation would exist.

(1) The employer claims that all employees had, at some point, an opportunity to participate in the ERI. Assuming the employer's claim is correct, employees age 60 at the time the ERI was adopted had only one year to decide on acceptance, while employees age 55 at that time had five years to decide. The fact remains, however, that all employees, including Ms. Cipriano, could have retired at or before the age of 60 and could have received the ERI bonus. Ms. Cipriano, in choosing voluntarily to continue in the employ of the employer, voluntarily waived her right to receive the ERI. Even though today a 60-year-old employee could retire with an ERI bonus, while Ms. Cipriano could not, the younger employee only would be exercising an option that Ms. Cipriano voluntarily waived at age 60.

(2) The ERI could also be viewed as a salary replacement plan, similar to the analysis in Britt v. E.I. duPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985). Since the younger employees are foregoing more years of potential earnings than are the older employees, then arguably they are entitled to a larger salary replacement. Citing to Patterson v. Independent School District, 742 F.2d 465 (8th Cir. 1984), the Britt Court made the following observation:

> . . . [T]he severance payments for giving up the contract right to work represented compensation. Since a younger worker gives up the right to work for a longer period of time, the sliding scale of diminishing benefits was appropriate, and instead of representing discrimination on the basis of age, simply reflected the reality that younger workers deserved more wage-substitute pay than an older worker closer to retirement age . . .

Britt, 742 F.2d at 595 n. 4. It is not inconceivable that this approach, combined with the fact that the older workers in Cipriano (those over 60) were not being encouraged to give up their contract right to continue work (no incentive available after 60), would lead a court to conclude that a Cipriano-type plan does not violate section 4(a)(1).

III. Recommendation

Since the 1986 ADEA amendments may render the section 4(a)(1)/4(f)(2) analysis herein moot for most cases arising after 1987, we recommend that the Commission not attempt in the Cipriano case to set a sweeping statement of policy. Rather, it should provide the minimum input that is consistent with its duty to the court. With regard to the three options set forth in Part II, we believe reasonable arguments can be made for each of them.

We will be available to join with you in your briefing of the Commissioners should you desire.

[illegible]
+ file

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20507

Office of the
Vice Chairman

July 9, 1987

MEMORANDUM:

TO : Charles A. Shanor
General Counsel

FROM : R. Gaull Silberman
Vice Chairman

SUBJECT : Draft Amicus Brief in Cipriano v. Board of Education

Per our conversation on Tuesday, here are my thoughts on the brief. Generally, I think the draft brief goes considerably beyond what the Second Circuit has asked us to do, and lays out a policy view with which I disagree, as you know. Moreover, at the Commission meeting at which this incentive plan was disapproved for litigation, both the Chairman and I took the position that this plan was lawful. I think the brief should be structured to answer the Second Circuit's questions narrowly without predetermining the Commission's future policy on early retirement incentives.

The Second Circuit has asked us to provide guidance on the meaning of "subterfuge" as applied to voluntary retirement incentives, and to inform the district court whether the Commission has issued its own guidelines on the meaning of subterfuge or the permissible means of structuring voluntary retirement plans. We should say in the brief that we have not issued such guidelines. The Second Circuit did not regard the DOL Interpretive Bulletin as definitively resolving the question of the permissible structure of early retirement incentives, and we may wish to comment on that.

It appears to me that the Interpretive Bulletin did not even consider the applicability of its definition of "subterfuge" to voluntary retirement incentives. While the I.B. contains extensive and detailed provisions for life, health, and long-term disability insurance, no mention is made of retirement incentives. The I.B. sets forth "special rules" for retirement and pension plans, stating that although those types of plans are clearly covered by 4(f)(2), they are not covered by the cost rule of the I.B. because of the 1978 legislative history indicating that Congress intended to permit cessation of pension accrual at normal retirement age: "Unlike the general principles with respect to other plans under section 4(f)(2), these rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans, which were of concern to Congress." 44 Fed. Reg. 30656. Since a normal retirement age beyond which an employee's pension is frozen is essentially a retirement incentive, one could argue that the I.B. impliedly sanctions other forms of retirement incentives, and does not subject them to the equal cost rule. At the least, one could argue that retirement incentives are simply not covered because they are not even alluded to in the very detailed provisions on either the cost rules or the "special rules" for retirement plans.

The legislative history of 4(f)(2) can also be read to demonstrate only that one purpose of Congress was to permit age-based reductions in certain employee benefits when the increased costs of such benefits, i.e., life, health, and disability insurance, would otherwise tend to discourage the employment of older workers or the maintenance of such plans. The legislative history does not limit the 4(f)(2) defense to such situations, however. Indeed, retirement and pension plans are clearly covered by 4(f)(2) although the cost of providing retirement and pension benefits does not necessarily increase with age.

Even if cost is the only defense, the 4(f)(2) defense need not be limited to a narrow definition of cost but could include the cost considerations mentioned by the Second Circuit, including saving salary expenses. There are significant differences between retirement incentives and the types of benefits addressed by the I.B.'s cost rule. Retirement incentives are provided only to employees who retire *voluntarily*. Retirement incentives are a quid pro quo: employees who accept them must forfeit the opportunity to continue working and maximize their pensions. This opportunity is generally worth more to younger employees. A greater benefit for younger workers may thus be necessary both to compensate them for the greater years of service they are giving up and to induce them to retire when they would otherwise choose to continue working. If employers are required to provide an equal incentive (or even some incentive) to every employee regardless of age -- and that now means employees of *any* age not just up to age 70 — and regardless of the likelihood of voluntary retirement without an incentive, then the resulting cost undoubtedly will cause many employers to abandon the early retirement benefit altogether. Since employees can choose to continue working, and since voluntary retirements may preclude an involuntary reduction in force, retirement incentives in my opinion promote rather than conflict with the purposes of the ADEA.

Although I think the best approach is to limit our brief narrowly to the facts of this case, I recognize that we must deal with the question of subterfuge as a matter of policy and that the draft brief accurately reflects past Commission policy on the meaning of 4(f)(2) in other contexts. But this brief will represent the first statement by the Commission on early retirement incentives. Perhaps the draft brief's discussion of permissible retirement incentives (pp. 12-17 and 28 n. 21) could provide some guidance in answering the court's question as to the meaning of subterfuge.

cc: Chairman Thomas
Commissioner Gallegos
Commissioner Kemp
Cynthia C. Matthews, Executive Officer
Richard Komer, Acting Legal Counsel

Johnston
Rec'd 1/31

U.S. Department of Justice

United States Attorney
Western District of New York

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July 27, 1987

Diana Johnson, Esq.
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Re: Sarah M. Cipriano v. Board of Education of the School District of the City of North Tonawanda, NY, et al. Civil No. 84-80-C (WDNY)

Dear Ms. Johnson:

On February 27, 1987, United States District Court Judge John T. Curtin entered an Order notifying you that he wished to be informed whether the EEOC will be intervening in the above-captioned action.

I have been assigned to monitor this case on behalf of the United States Attorney's Office. Please contact me at FTS 437-4811 to advise as to whether or not EEOC will be intervening.

Very truly yours,

ROGER P. WILLIAMS
United States Attorney

BY: KATHLEEN M. MEHLTRETTER
Assistant U. S. Attorney
Chief, Criminal Division

KMM:cas

No. 84-CV-80C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NORTH TONAWANDA,
and NORTH TONAWANDA UNITED TEACHERS,

Defendants.

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

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29 C.F.R. § 860.120(a)...................................19,21,22

29 C.F.R. § 860.120(d)(1).................................21,24

44 Fed. Reg. 37974 (June 29,1979)........................... 20,33

44 Fed. Reg. 30648 (May 25, 1979).............................. 19

44 Fed. Reg. 30653 (May 25, 1979)........................... 21,34

52 Fed. Reg. 23811 (June 25, 1987)............................. 20

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA UNITED TEACHERS

Defendants.

No. 84-CV-80C

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

INTRODUCTION

Statement of Interest of Amicus Curiae

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than twenty-six million persons over the age of fifty. AARP is the largest organized group of older Americans in the country. In representing the interests of older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force.

In keeping with those purposes, AARP has devoted itself to investigating and working to alleviate problems resulting from age discrimination in employment, as well as other aspects of life. Millions of AARP's members are employed individuals over the age of fifty who are covered by the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. ("ADEA"). The legal issues raised in this litigation directly relate to the manner in which an employer may lawfully impose age limitations to exclude older workers from the receipt of cash retirement incentives. Resolution of the legal issues now before the Court could have a direct bearing on the terms of employment of thousands of AARP members and other older employees.[1]

Statement of the Case

The plaintiffs in this case, Sarah M. Cipriano and Jeune M. Miller, were employed as teachers by the North Tonawanda City School System ("the School System"). Both were subject to the terms of a collective bargaining agreement negotiated between the School System and the North Tonawanda United Teachers ("the Union"). That agreement, effective July 1, 1980 through June 30, 1983, provided that persons between the ages of 55 and 60 would be entitled to certain incentives upon their voluntary retirement.[2] Since both plaintiffs passed their 61st birthday before July 1980, they were excluded from obtaining the retirement incentive solely as a result of their ages, while the incentive was available to their younger counterparts with comparable years of service.[3]

Plaintiffs allege that the denial of the retirement incentive because of age constitutes a violation of the ADEA. Plaintiffs do not now, nor have they ever, alleged that their ultimate retirement was "involuntary."

The Union moved to dismiss the complaint on the ground, inter alia, that the denial of retirement incentives to employees aged 60 or older was in observance of the terms of a bona fide employee benefit plan which was not a subterfuge to evade the purposes of the ADEA. In so moving, the Union sought to take advantage of the affirmative defense set forth at § 4(f)(2) of the ADEA.

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[1] In addition to its amicus participation in this litigation, see 785 F.2d at 51, 53, the Second Circuit recently requested AARP's participation in another retirement incentive case, Paolillo v. Dresser Industries, ___F.2d___, 44 F.E.P. Cases (BNA) 71 (2d Cir. 1987).

[2] Employees with 20 years of service could elect either of two optional retirement-incentives. Under Option A, the School System agreed to reimburse retirees for health insurance premiums until age 65 and to pay a lump sum of $2,000 plus $50 for each additional year of service beyond 20 years. Option B constituted a lump sum payment of $10,000.

[3] In summarizing the record, the Court of Appeals mistakenly stated that "[p]laintiffs were 61 years old on July 1, 1980,... ." Cipriano v. Board of Education of North Tonawanda, 785 F.2d 51, 52 (2d Cir. 1986). Subsequent discovery revealed that Plaintiff Cipriano was born on April 14, 1916. See Cipriano Deposition at 4. Plaintiff Miller was born on June 12, 1916. See Miller Deposition at 45.

This Court rendered an opinion granting summary judgment in favor of the defendants in reliance on § 4(f)(2). The Court found that the plan attacked by the plaintiffs was a "bona fide" retirement plan within § 4(f)(2) and that there "was nothing in the record to indicate that this plan is a subterfuge to evade the purposes of the Act." 785 F.2d at 53.

Court of Appeals Opinion

The Court of Appeals recognized that "if it were not for § 4(f)(2), the incentive plan would run afoul of § 4(a)(1) of the ADEA,..." which makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 785 F.2d at 53-54.

In determining the applicability of the affirmative defense set forth at § 4(f)(2),[4] the Court of Appeals considered two specific issues -- first, whether the challenged incentive is the type of bona fide "employee benefit plan" to which the § 4(f)(2) exception applies and, second, whether the defendants had discharged their burden of proving that the incentive was not a "subterfuge" to evade the purposes of the ADEA. 785 F.2d at 54.

On the first question, the Court of Appeals concluded that the challenged incentive is a "`bona fide employee benefit plan' in the sense that employees benefitted and substantial benefits were paid to employees who were covered by it." 785 F.2d at 54 citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 (1977) and EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). The court further declared that "we see no reason to doubt that the incentive plan, when read as a supplement to an underlying general retirement plan, was a "retirement plan" for the purposes of § 4(f)(2)." 785 F.2d at 54.

With regard to whether the retirement incentive constituted a "subterfuge" to evade the purposes of the ADEA, the Court of

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[4] § 4(f)(2) reads as follows:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization --

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by § 12(a) of this Act because of the age of such individual.

Appeals held that the defendants had not met their burden of proof. Relying on its earlier decision in EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982), the Court of Appeals confirmed "that the mere fact that a plan is bona fide...does not establish that it is not a subterfuge..." 785 F.2d at 57. In reversing and remanding to this Court, the Court of Appeals stated that "the employer - and also here the union - must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did." 785 F.2d at 58.

SUMMARY OF ARGUMENT

In light of the remand directed by the Court of Appeals, this Court must determine whether the defendants' have established that the age-based exclusion of the plaintiffs from the challenged incentive is not a "subterfuge" to evade the ADEA. While this determination must necessarily await the submission of an appropriately supported motion, this Court has requested the views of the Equal Employment Opportunity Commission ("EEOC") concerning the "nature of proof which will discharge defendants' burden of proving the absence of 'subterfuge' in cases such as this." See Memorandum of Law for the Equal Employment Opportunity Commission at 10 (hereinafter "EEOC Brief"). Unfortunately, the novel legal theory proposed by EEOC is contrary to the legislative history and purpose of the ADEA and the contemporaneous, longstanding regulations interpreting Section 4(f)(2) which have been endorsed repeatedly by Congress. For that reason, AARP submits this brief amicus curiae to assist the Court in applying the longstanding principles of § 4(f)(2) to the incentive benefit challenged in this case.

To establish the § 4(f)(2) exception, the employer must prove that its retirement incentive is the type of "plan" contemplated by the statute. EEOC v. Borden's, Inc., 724 F.2d 1390, 1395 (9th Cir. 1984). Beyond that initial showing, the employer must also prove that its otherwise discriminatory conduct was: (1) in observance of the terms of a (2) bona fide employee benefit plan; and (3) is not a subterfuge to evade the purposes of the ADEA. EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982).

The Court of Appeals held that the incentive here is the type of plan covered by the statute and satisfied the first two elements of the defense. However, those findings should be re-examined because they conflict with the subsequent decision of the Supreme Court in Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987), which concluded that a one-time benefit payment was not an "employee benefit plan."

Even if this Court finds that the challenged incentive is a "plan" protected by the statute, the court must then determine whether the age-based exclusion of the plaintiffs is a "subterfuge" under § 4(f)(2). In view of the purposes, legislative history, and longstanding administrative interpretations of Section 4(f)(2), the employer may prove that a plan is not a "subterfuge" only by demonstrating either that (a) the plan provides equal benefits without regard to age, or (b) the plan incurs equal costs for benefits on behalf of all employees. This "equal benefit or equal cost" principle harmonizes two critical purposes of the ADEA. It fosters the eradication of arbitrary age discrimination while it facilitates the hiring of older workers by not imposing excessive benefit costs on employers.

Administrative interpretations setting forth the "equal benefit or equal cost" principle: (1) were issued contemporaneously with the passage of the ADEA, (2) were reissued in more comprehensive form in 1979 reaffirming the principle, (3) have remained unchanged through four different amendments to the ADEA, and (4) have been specifically and repeatedly endorsed by Congress. These interpretations, which are entitled to great deference by this Court, require an employer to show that where the challenged benefits are unequal on the basis of the employee's age, the employer nevertheless incurs equal cost for the challenged benefit on behalf of older employees. Since the defendants here neither provided the retirement incentive to plaintiffs nor incurred any costs for it on their behalf, the defendants are legally incapable of demonstrating that the plan is protected by the narrow defense of § 4(f)(2).

Since the EEOC's novel legal theory is inconsistent with (a) the language, legislative history and purposes of the ADEA, (b) its own existing administrative regulations, and (c) existing Supreme Court precedent, it is entitled to no deference by this Court. In direct response to the EEOC Brief, AARP sets forth the following legal arguments to assist the Court in its further consideration of the issues presented in this litigation.

ARGUMENT

I. The Challenged Benefit Is Not Protected By Section 4(f)(2) of the ADEA

On appeal, plaintiffs argued that the affirmative defense set forth at § 4(f)(2) was inapplicable to the challenged retirement incentive on the grounds that it was not a "bona fide employee benefit plan." Relying exclusively on the description of the benefit set forth in the collective bargaining agreement,[5] the Court of Appeals ruled that because the challenged incentive paid substantial benefits and was a "supplement to an underlying general retirement plan, [it] was a 'retirement' plan for the purposes of § 4(f)(2)." 785 F.2d at 54.

Subsequent to the Second Circuit's decision, the Supreme Court decided Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) ("Fort Halifax"), which held that a one-time benefit payment was not an "employee benefit plan." In light of the Supreme Court's holding, this Court must reexamine the applicability of § 4(f)(2) to the incentive in this case.

In Fort Halifax, the Court considered whether Maine's severance pay law was preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). In reaching its decision, the Court was required to determine whether the one-time severance payment mandated by the state law related to an "employee benefit plan" under ERISA.[6] In rejecting arguments in favor of preemption, the Court concluded that the one-time severance payments did not constitute an "employee benefit plan" that would trigger ERISA's preemption provisions. 107 S. Ct. at 2217-2218.

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[5] The record on appeal did not include a copy of the applicable pension plan, nor did it contain evidence that the incentive was functionally tied to the pension plan in any manner.

[6] ERISA's broad preemption provision reads as follows:

> [T]he provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title. (emphasis added) 29 U.S.C. § 1144(a).

The Court's holding was predicated on the fundamental differences between employee "benefits" and "employee benefit plans." In contrast to the "ongoing administrative program to meet the employer's obligation" in an employee benefit *plan*, Court concluded that a one-time payment constitutes no more than an employee *benefit*. *Fort Halifax,* 107 S. Ct. at 2217 in reasoning directly applicable to the challenged incentive benefit here, the Court held:

> The requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. ... *To do little more than write a check hardly constitutes the operation of a benefit plan*.

107 S. Ct. at 2218 (Emphasis added; footnote omitted).

Clearly, the holding in *Fort Halifax* requires a fresh determination by this Court of the availability of the Section 4(f)(2) defense to the incentive in this case. The plain language of the exception renders § 4(f)(2) applicable only to "employee benefit *plans*." While the Court of Appeals held that a benefit is a "plan" so long as it is "substantial" and "supplements" a retirement plan (785 F.2d at 54), the subsequent decision in *Fort Halifax* makes it clear that the term "employee benefit plan" must be applied more restrictively.[7]

Indeed, the decision in *Fort Halifax* implicitly affirms the appellate decisions in *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984),[8] *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211

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[7] The 1986 amendments to the ADEA confirm Congress' desire to maintain a degree of parallelism between "employee benefit plans" regulated by the ADEA and ERISA. Section 9201 of the Omnibus Budget Reconciliation Act of 1986 added Section 4(i) to the ADEA explicitly prohibiting age discrimination in pension and retirement plans. Pub. L. No. 99-509, § 9201; H.R. Rep. No. 1012, 99th Cong. 2d Sess. 374, 378, *reprinted in* 1986 U.S. Code Cong.& Ad. News 4019, 4023. In enacting identical substantive amendments to the Internal Revenue Code and ERISA, Congress expressly declared that the ADEA was to utilize the definition of "employee benefit plan" set forth in Section 3 of ERISA, 29 U.S.C. § 1003(3) See Pub. L. No. 99-509. § (3).

[8] In *EEOC v. Borden's, Inc.*, 724 F.2d 1390, pension-eligible employees aged 55 and older were denied one-time severance pay benefits which were extended to similarly situated younger employees when the company closed one of its plants. After a review of the legislative history and the administrative interpretations of §4(f)(2), the Ninth Circuit concluded that Borden's "one-time, *ad hoc* cash payment" of severance benefits was "not an `employee benefit plan such as a retirement, pension, or insurance plan'." 724 F.2d at 1396.

(3rd Cir.), <u>cert. denied</u>, 469 U.S. 820 (1984),[9] and <u>Alford v. City of Lubbock</u>, 664 F.2d 1263 (5th Cir.), <u>cert. denied</u>, 456 U.S. 975 (1982).[10] In each of those cases, a "one-time lump sum payment triggered by a single event," <u>Fort Halifax</u>, 107 S. Ct. at 2218, was deemed not to constitute the type of "employee benefit plan" to which § 4(f)(2) applies.

Read together, <u>Fort Halifax</u>, <u>Borden's</u>, <u>Westinghouse</u> and <u>Alford</u> all uniformly show that the type of one-time lump sum employee benefit challenged in this litigation does not constitute an "employee benefit plan" within the meaning of § 4(f)(2). This court must make that determination in the first instance upon a full factual record, applying the principles of law set forth in <u>Fort Halifax</u>.

II. The "Subterfuge" Standard of Section 4(f)(2) <u>Requires Proof of "Equal Benefit or Equal Cost".</u>

It is settled law that exceptions to the prohibitions of

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[9] In <u>EEOC v. Westinghouse Electric Corp.</u>, 724 F.2d 21 benefits available under the company's Layoff and Income Benefit Plan ("LIB") were denied to pension-eligible employees beyond the age of 55. The LIB benefit was available as a lump-sum payment and was calculated on the basis of length of service, like option A of the retirement incentive in this case which increased according to the number of years of service in excess of twenty. 725 F.2d at 214. In rejecting an application of the § 4(f)(2) exception to the LIB plan, the court observed that "[t]he thread common to retirement, insurance and pension plans, but not found in the LIB Plan, is the age-related cost factor." <u>EEOC v. Westinghouse</u>, 725 F.2d at 224. The court found that the LIB plan was "more analogous to a `fringe benefit'" and concluded that "[f]ringe benefit plans unrelated to the age cost factor are not included in the 4(f)(2) exception." <u>Id.</u> at 225.

[10] In <u>Alford v. City of Lubbock</u>, 664 F.2d 1263, the city maintained a policy of paying retiring employees a lump sum for accumulated sick leave. That policy, however, did not apply to employees hired after the age of 50 who were excluded from participation in the city's pension plan. In addressing the city's defense that its practice fell within the § 4(f)(2) exception, the court observed that "we do not believe that Congress, in developing the ADEA exemption for employee benefits plans...meant to countenance the discriminatory dispensation of all fringe benefits whether or not they are part of a specific and established `benefit plan'." <u>Id.</u> at 1272. The court went on to conclude that the city's policy did not incorporate age as a cost factor in plan design, and therefore was not entitled to the protections of § 4(f)(2) of the ADEA. <u>Id.</u>

§ 4(a)(1) are to be narrowly construed[11] and the employer must show that the challenged practice "plainly and unmistakably" meets the "terms and spirit" of the remedial legislation. Air Line Pilots Association v. Trans World Airlines, Inc., 713 F.2d 940, 954 (2d Cir. 1983), aff'd in part, rev'd on other grounds, sub nom. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). Both the legislative history of the ADEA and the longstanding administrative interpretations of § 4(f)(2) demonstrate that in order to meet the burden of proving that a "benefit plan" is not a subterfuge, the employer must establish that it provides equal benefits or incurs equal cost for benefits regardless of age. This "equal benefit or equal cost" principle is the cornerstone of the exception, has been embodied in administrative interpretations since the ADEA's enactment, and has been endorsed explicitly and repeatedly by Congress.

A. Twenty Years of Legislative Action Confirms the Mandate of Section 4(f)(2) of the ADEA ----Equal Benefits or Equal Cost.

The 1967 legislative history to the ADEA reveals that the specific and very limited purpose of § 4(f)(2) was to ensure that employers were not discouraged from hiring older workers due to excessive benefit costs. The administration's proposed bill for the ADEA, S.830, introduced in 1967, contained no provisions for the observance of bona fide employee benefit plans. Recognizing that the cost of certain employee benefits increases with age, Senator Jacob Javits, minority manager of the ADEA, declared that:

> "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problems. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.

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[11] Orsel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 469 U.S. 832 (1982).

Hearings on S.830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967). Consequently, Javits introduced the amendment which became § 4(f)(2) because:

> ...in its absence employers might actually have been discouraged from hiring older workers because of the increased cost involved in providing certain types of benefits to them.

S. Rep. No. 723, 90th Cong., 1st Sess. 13 (1967). (Views of Mr. Javits)(emphasis added). As the Supreme Court has stated, Javits' apparent concern:

> "was that it [the Administration's bill] did not appear to give employers flexibility to hire older employees without incurring extraordinary expenses because of their inclusion in existing retirement plans."

United Air Lines, Inc. v. McMann, 434 U.S. 192, 199-200 (1978). The floor debates confirmed that understanding. During the 1967 Senate debate, Senator Javits explained that the exception would not require equal benefits for older employees when those benefits were more costly to provide. He stated:

> The meaning of this [§ 623(f)(2)] provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course or other condition with respect to a retirement, pension or insurance plan which is not merely a subterfuge to evade the purposes of the act - and we understand that - in order to give that older employee employment on the same terms as others.

113 Cong. Rec. 31255 (November 6, 1967)(emphasis added). Responding to Senator Javits, Senator Yarborough, majority manager of the ADEA agreed and stated:

> This [§ 623(f)(2)] will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.

113 Cong. Rec. 31255 [12]. See also remarks of Representative Daniels, 113 Cong. Rec. 34746 (December 4, 1967) (§ 4(f)(2) "is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits"). Thus, it is clear that Congress wanted to ensure that employers were not discouraged from hiring older workers,

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[12] The views of Senators Javits and Yarborough, as sponsors of the ADEA, are entitled to substantial weight in interpreting the statute. Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

the primary purpose of the ADEA.[13] To achieve this objective, Congress enacted § 4(f)(2) "relieving employers of the duty to provide [older workers] with equal benefits - where equal benefits would be more costly for older workers." EEOC v. Borden's, Inc., 724 F.2d at 1396.

The "equal benefit or equal cost" principle remained unchanged through the 1974 and 1978 amendments to the ADEA. During the 1978 amendments, which, inter alia, amended § 4(f)(2) to explicitly prohibit involuntary retirement, the managers of the ADEA amendments and others expressed specific approval of the existing "equal benefit or equal cost" principle.

Senator Javits, while addressing the proposed amendment of § 4(f)(2), stated:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. 8218 (March 23, 1978) (emphasis added). Senator Williams, the majority manager of the bill, agreed that Senator Javits' statement "accurately reflects congressional intent in this regard." Id; S. Rep. No. 493, 95th Cong., 1st Sess. 9,10, reprinted in 1977 U.S. Code Cong. & Ad. News 512, 513. In addition to the amendment's managers in the Senate, managers and other legislators from the House stated that § 4(f)(2) authorizes only reductions in benefits necessitated by increased benefit costs and noted that the exception does not

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[13] Section 2(b) of the Act, 29 U.S.C. § 621(b) states that:

> It is therefore the purpose of this Act to promote the employment of older persons based on their ability rather than age;...

authorize the total cutoff of benefits to older workers because of age.[14]

B. Contemporaneous and Longstanding Administrative Regulations Confirm the "Equal Benefit or Equal Cost" Principle

Shortly after passage of the Act, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted § 4(f)(2) as implementing a congressional intent that age-based differences in employee benefits be permitted where justified by age-related cost increases for some benefits. This 1969 interpretation articulated the "equal benefit or equal cost" principle as follows:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. *A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*

29 C.F.R. § 860.120(a) (1970). (emphasis added). *See* *EEOC v. Borden's Inc.*, 724 F.2d at 1396. As a contemporaneous construction of the statute by the enforcement agency, the "equal benefit or equal cost" principle is entitled to great deference by the courts. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

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[14] Remarks of Rep. Waxman, 124 Cong. Rec. 7888 (March 21, 1978) ("*In the absence of actuarial data which clearly demonstrates* that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act.") (emphasis added); Remarks of Rep. Pepper, 124 Cong. Rec. 7886 (March 21, 1978); Remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978) ("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher."); Remarks of Rep. Weiss, 124 Cong. Rec. 7887 (March 21, 1978); *see also* H. R. Rep. No. 527, 95th Cong. 1st Sess. 8.

After the passage of the 1978 amendments, the Department of Labor responded to congressional requests for more comprehensive guidance regarding § 4(f)(2)[15] by issuing an amendment to its Interpretative Bulletin on Employee Benefit Plans, 29. C.F.R. § 860.120, 44 Fed. Reg. 30648 (May 25, 1979). The amendment, which specifically relied on the extensive legislative history cited herein, continued in effect the "equal benefit or equal cost" principle previously enunciated by the Department and endorsed by Congress.[16] The detailed regulation and the accompanying explanatory material made several relevant points absolutely clear.[17] First, while the regulation provided an in-depth discussion of four of the most common types of employee benefit plans - group term life insurance, group health insurance, long-term disability, and retirement plans, (29 C.F.R. §§ 860.120(f) (i)-(iv)), it was patently clear that the "equal benefit or equal cost" principle applied to all employee benefit plans to which Section 4(f)(2) applied.[18]

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[15] 15 *See* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978); remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (March 23, 1978) (" [t]he Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans, and the Secretary is urged to act as soon as possible").

[16] The amendment to the Interpretative Bulletin provided:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations ... Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. *A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker* even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. 29 C.F.R. § 860.120(a)(1).

[17] Effective July 1, 1979, Congress transferred enforcement authority over the ADEA from the Department of Labor to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), *reprinted in*, 92 Stat. 3781 (1978). The relevant DOL regulations have not been changed by the EEOC. The were continued in effect by the EEOC in 1979, 44 Fed. Reg. 37974 (June 29, 1979), and were recently recodified at 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25, 1987).

[18] *See* 29 C.F.R. § 860.120(a)(1) ("where *employee benefit plans* do meet the criteria in section 4(f)(2) ...") (emphasis added); (*A benefit plan* will be considered in compliance with the statute where the actual amount of payment made, or cost incurred . . . .is equal . . . ") (emphasis added); *see also* 44 Fed. Reg. 30651 ("Although not specifically discussed herein, *other plans within section 4(f)(2)*, such as short term disability and accidental death and dismemberment *are subject to the same general principles*") (emphasis added).

Second, the regulations reaffirmed the intent of the original "equal benefit or equal cost" principle by specifying that the only cost relevant to the issue of "subterfuge" was *the cost of the challenged benefit*. Under a heading entitled "Subterfuge" the regulations stated:

> (1) Cost data - General. Cost data used in justification of benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. *This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years.*

29 C.F.R.§ 860.120(d)(1) (emphasis added); *see also* 44 Fed. Reg. 30653 (May 25, 1979) ("under the benefit-by-benefit approach, as outlined above, *reductions in the level of one benefit* such as group term life insurance - *must be justified by an increase in the cost of that particular benefit*, regardless of any adjustment in the levels of other benefits.") (Emphasis added).

Third, the regulations declared only "one exception to the otherwise uniform rule under Section 4(f)(2) that age based reductions in employee benefit plans must be justified by actuarially significant cost considerations."[19] 44 Fed. Reg. 30649; *see* 29 C.F.R. §§ 860.120(f)(i)(iv)(B)(1)-(7) (1979). That exception, which interpreted the ADEA to permit employers to incur no pension costs for certain employees, has since been legislatively rescinded.[20] Section 4(i) of the ADEA, Pub. L. No. 99-509, § 9201.

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[19] The only exception recognized in the regulations was for the costs of continued pension benefits after normal retirement age. Thus, the EEOC's suggestion that the Interpretative Bulletin contained a Medicare "exception" to the equal benefit/equal cost principle is in error. Although the Interpretative Bulletin permitted an employer to take Medicare into account, it nevertheless required that the plan provide "benefits which are no less favorable," or in other words, satisfy the equal benefit prong of the test. Furthermore, the Bulletin emphasized that the "total denial on the basis of age of employer-provided health benefits ... would never be justified." 29 C.F.R.§ 860.120(f)(ii)(A)&(B).

Congress has twice amended the ADEA since 1978. See Section 4(g) of the ADEA, Pub. L. No. 97-248, § 116. See also S. Rep. No. 494, 97th Cong., 2d Sess, reprinted in 1982 U.S. Code Cong. & Ad. News 792; Section 4(i) of the ADEA, Pub. L. No. 99-509, § 9201. Under established principles of statutory construction, such activity strongly supports the conclusion that Congress has reviewed and approved existing EEOC regulations that § 4(f)(2) allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age.[21]

In summary, twenty years of congressional actions and consistent agency interpretations make the following points clear: (1) all employee benefit plans covered by § 4(f)(2) must meet the "equal benefit or equal cost" principle; (2) the only relevant cost for these purposes is the cost of the challenged benefit; and (3) the only exception (since rescinded) pertained to employees participating in retirement plans beyond their "normal retirement age."

III. The EEOC's New Position Modifying the "Subterfuge" Standard For Early Retirement Incentives Is Not Entitled to Any Deference.

Contradicting the law, the legislative history of the ADEA, and the agency's own longstanding regulations, the EEOC suggests that the Court take the unprecedented step of creating an "exception" to the requirements of § 4(f)(2) for "truly voluntary early retirement incentive plans". EEOC Brief at 28. Because the justification for the suggested exception to § 4(f)(2) is premised on the wholly irrelevant consideration of the voluntary nature of the incentive, the agency's theory is fundamentally flawed. Building on this erroneous premise, EEOC then proposes that the type of costs which may satisfy proof of subterfuge are general economic savings, such as payroll costs.[22] This suggestion blatantly disregards the well-established rule that general economic savings to an employer may never justify overt age discrimination. In practical effect, the EEOC asks this Court to overturn the agency's own regulations as they pertain to the "subterfuge" provision. This Court should decline the EEOC's invitation to legitimize this unprecedented regulatory about-face.[23]

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[20] In addition, the EEOC twice voted to rescind the pension provisions of the Interpretative Bulletin, largely because they were contrary to the "equal benefit or equal cost" principle. The agency's refusal to take expeditious action implementing those decisions led to the court-ordered rescission of the only existing "exception" to the general rule. See AARP v. EEOC, 655 F. Supp. 228 (D.D.C.), rev'd in part on other grounds, __ F. 2d ____, 8 E.B.C. (BNA) 1969 (D.C. Cir. 1987).

[21] See, EEOC Brief at 25, n. 18.

The most comprehensive statement of the role of interpretative rulings by an enforcing agency is set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944). In Skidmore, the Supreme Court was called upon to determine the entitlement of several employees to overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act. In so doing, the Court had to determine the proper weight to accord to rulings of the Administrator of the Wage-Hour Division. The Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

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[22] See EEOC Brief at 5 (emphasis added):

> In the Commission's view, an employer--and here the union--may prove that the plan "is not a subterfuge to evade the purposes of the [ADEA]" by demonstrating that the age limitations are justified by an objective assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives.

[23] The agency's abrupt rejection of its own regulations appears to also violate the Administrative Procedure Act ("APA"). While an agency has the flexibility to reexamine and reinterpret its previous holdings, it must do so by clearly indicating and explaining its action so as to enable judicial review. Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 806-09 (1973); Office of Communication of United Church of Christ v. F.C.C., 560 F.2d 529, 532-33 (2d Cir. 1977). When as here, the agency position would constitute a departure from prior standards, the agency must first give notice that the standard is to be changed, Boston Edison Co. v. Federal Power Comm., 557 F.2d 845, 849 (D.C. Cir. 1977), must provide a thorough and comprehensive statement of reasons for the change, Atchison, supra; United Church of Christ, supra; Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), and must discuss the past precedent, Marine Space Enclosures, Inc. v. Federal Maritime Comm., 420 F.2d 577, 585 (D.C. Cir. 1969).

Ironically, the EEOC was advised of these very requirements by its own Legal Counsel when it contemplated modification to the only "exception" to the "equal benefit or equal cost" principle. See Memorandum of April 30, 1984, 124 Daily Labor Rept. (BNA) at g-8 (June 27, 1984); Id. at g-10 ("Since the special rules' [on pension costs after age 65] are currently in effect.... their rescission would constitute a change in position requiring formal notice and comment procedures." (Emphasis added).

Id. at 140.

The Skidmore standards were specifically applied to the EEOC in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), resulting in the rejection of an interpretation which conflicted with the agency's contemporaneous interpretation of Title VII. In Gilbert, the Court was faced with an EEOC interpretation of Title VII which had a direct bearing on the outcome of the case. In choosing not to defer to the agency interpretation, the Court quoted extensively from Skidmore and appeared to rely heavily on the fact that the 1972 guideline called into question and contradicted an agency position enunciated at a time closer to enactment of the governing statute. General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976).[24]

In its memorandum, EEOC proposes a theory that voluntary retirement incentive benefits are an "exception" to the "equal benefit or equal cost" principle. When measured by the Skidmore standards, the EEOC's proposition about retirement incentive benefits is not entitled to deference by this Court.

A. The "Voluntary" Nature of a Benefit that Excludes Certain Workers Is Irrelevant to a § 4(f)(2) Defense.

The Court of Appeals held that "even in the case of voluntary early retirement plans the employer --- and also here the union --- must come up with some evidence that the plan is not a subterfuge..." 785 F.2d at 58. Disregarding the Court's premise that the voluntary nature of the plan is irrelevant to the proof of subterfuge, EEOC argues otherwise in proposing an exception to § 4(f)(2). EEOC suggests, "[t]he factor which distinguishes early retirement incentive plans from other employee benefits plans, and which warrants an exception to the equal cost method of disproving subterfuge, is the voluntary nature of employee participation in such plans." EEOC Brief at 28-29. The purported "exception" is fundamentally flawed.[25]

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[24] In contrast, when the EEOC interpretation (like the "equal benefit or equal cost" principle at issue here) was issued contemporaneously with the passage of the statute, consistent over a long period of time, and implicitly endorsed by subsequent congressional action, the interpretation is entitled to a "special deference" by the Courts. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 (1981).

In general, § 4(f)(2) is relevant to two distinct types of retirement incentives claims. In one type of claim, a plaintiff alleges that retirement was "involuntary" pursuant to a "bona fide employee benefit plan" in which the employee participated. The focus of this claim and the defense is on whether the employee's decision to depart was truly "voluntary." Paolillo v. Dresser Industries, __F.2d___, 44 F.E.P. Cases (BNA) 71 (2d Cir. 1987).

In the second type of early retirement incentive claim subject to § 4(f)(2), a plaintiff alleges that he or she was denied a retirement incentive benefit solely based on age. In this second type of claim, the "voluntary" nature of the benefit is simply irrelevant to proving a violation of § 4(a)(1) or the § 4(f)(2) defense.

EEOC suggests that the "availability of a window of participation for all retirement eligible employees may be crucial to a showing of subterfuge." However, the Court of Appeals clearly stated that the availability of a window is immaterial. 785 F.2d 52 n.2. In other words, the opportunity to participate in a benefit at one time does not foreclose a claim if the opportunity is later offered in a discriminatory manner.

Not only is EEOC's focus on the "voluntary" nature of the plan contrary to the Court of Appeal's reasoning, it conflicts with Supreme Court precedent. In Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983), the Court specifically held that "the opportunity to participate in [an employee benefit] plan constitutes a condition or privilege of employment." 463 U.S. at 1079. In addressing the defendant's claim that its plan did not violate Title VII because it was voluntary, the Court in Norris concluded:

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[25] EEOC's assertion that the incentive was previously offered without regard to age is factually incorrect as well as legally immaterial. Defendants prior and subsequent incentive packages repeatedly contained age-based exclusions and cut-offs. See Retirement Incentive provisions in the Contracts Between the Board of Education and the North Tonawanda United Teachers, Addendum to Contract 1976-1979, and Contract July 1, 1984-1988.

> It is irrelevant that female employees in [Los Angeles Dept. of Water & Power v.] Manhart were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary. Title VII forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice.

Id. at 1081-1082 n. 10.

Insofar as the substantive provisions of the ADEA were taken in haec verba from Title VII they are to be given the same construction. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978).

Since the linchpin of the EEOC's theory about an "exception" for retirement incentives is premised on a legal proposition specifically rejected by the Supreme Court, EEOC's position is fatally flawed and entitled to no deference from this Court.

B. Cost Savings to the Employer Can Never Justify Overt Discrimination

An even more fundamental flaw in the EEOC's logic is its suggestion that general economic savings to the employer, such as the cost of salaries, may be a permissible grounds for overt discrimination. The EEOC's assertion that payroll savings may satisfy the cost justification burden of the subterfuge test turns the subterfuge defense on its head. The only legitimate proof of cost justification is that the cost of the benefit offered to employees increases with age. Even under the "equal benefit or equal cost" principle, an absolute cut-off based on age is never justified. 29 C.F.R.§ 860.120(f) recodified at §1625.10, 52 Fed. Reg. 23811 (June 25, 1987). The EEOC's failure to mention the monolithic body of case law that refutes its proposition and the EEOC's lack of candor regarding the agency's applicable regulations on this issue are fatal to its arguments.

This Circuit and others have uniformly rejected economic considerations as a defense to a claim brought under the ADEA. Geller v. Markham, 635 F. 2d 1022, 1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978), aff'd in part and rev'd in part, (unpublished opinion, 608 F.2d 1369).[26] Franci v. Avco Corp., 538 F. Supp. 250 (D. Conn. 1982). Accord EEOC v. City of Altoona, 723 F.2d 4, 7 (3d Cir. 1983); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983).

The Second Circuit has repeatedly recognized that an employer's assertion of payroll savings for treating older workers differently cannot justify discrimination. In Geller v. Markham, 635 F.2d 1022, 1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981), the Second Circuit held that economic considerations which supported a policy excluding teachers with more than five years of experience were not a defense to a claim under the ADEA. The Court specifically approved existing EEOC regulations which declared:

> a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation - an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed." 29 C.F.R. § 860.103(h) (1979).

635 F.2d at 1034. Geller forecloses EEOC's attempt to legitimize the consideration of payroll savings in the employer's defense.[27]

Perhaps more to the point is the Second Circuit's affirmance of the lower court's decision in Marshall v. Arlene Knitwear, 454 F. Supp. 715 (E.D.N.Y. 1978), which concluded that it is unlawful for an employer to consider the "anticipated working life of employees" EEOC Brief at 33, in terms of cost savings. In Arlene

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[26] This case was appealed to the Second Circuit which affirmed in part and reversed in part in an unpublished opinion noted at 608 F.2d 1369 (2nd Cir. 1979). The court reversed the award of backpay but affirmed the decision below in all other respects.

[27] Current EEOC guidelines state:

> A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

29 C.F.R. § 1625.7(f), 46 Fed. Reg. 47727 (1981). These guidelines adopt without substantive change the position previously taken by the Department of Labor when it administered the ADEA. See preamble to proposed EEOC guidelines, 44 Fed. Reg. 68858 (1979).

Knitwear, the court concluded that the discharge of a 62 year old designer within two years of retirement violated the ADEA. The court found that the employer selected plaintiff for discharge in order to eliminate her high salary (which resulted from her long years of service), to avoid pension costs, and because plaintiff only had a limited number of years of service remaining with the company. The court held that these were not legitimate, non-discriminatory factors which could justify disparate treatment of older workers:

> Where economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons.

454 F. Supp. at 728 (citations omitted)(emphasis added). See also Franci v. Avco Corp., 538 F. Supp. 250 (D. Conn. 1982) (employer violated ADEA where it encouraged layoff of highly paid and experienced older workers in order to save money). The reasoning in Arlene Knitwear has been specifically adopted by at least one other circuit. See Leftwich v. Harris-Stowe State College, 702 F. 2d at 692.

These cases, especially Arlene Knitwear, establish a principle that is directly at odds with the EEOC's suggestion that the employer may disprove "subterfuge" by incorporating "such factors as the anticipated working life of employees...." EEOC Brief at 33. The very language of the lower court in Arlene Knitwear forecloses the type of considerations about costs and service in the novel "exception" proposed by the EEOC. The Second Circuit in affirming Arlene Knitwear firmly established that an employer may not base age-related employment decisions on any general assumptions about an "expectation of longer future service."

C. The EEOC's Position Is Inconsistent with Its Own Regulations

As the Supreme Court noted in Skidmore, one of the critical considerations in evaluating an agency interpretation is "its consistency with earlier and later pronouncements." 323 U.S. at 140. Under this standard, the EEOC's new "exception" to the requirements of Section 4(f)(2) fails totally.

First, despite the EEOC's suggestion to the contrary, both the 1969 regulations issued contemporaneously with the passage of the ADEA and the 1979 regulations promulgated contemporaneously with the 1978 amendments require that "employee benefit plans" provide equal benefits or incur equal cost for benefits under the limitations of § 4(f)(2). The language of these regulations, consistent with the legislative history, makes them generically applicable to any plans to which the § 4(f)(2) exception is applicable. *See infra* at 21-22 and note 18. Although the EEOC attempts to make much of the fact that the legislative history does not mention retirement incentive benefits, EEOC Brief at 27, the EEOC has consistently recognized that the words "'such as retirement, pension or insurance' were added in a descriptive sense, not excluding other kinds of employee benefits." *EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 224: *EEOC v. Borden's Inc.*, 724 F.2d at 1395. In *Westinghouse* and *Borden's*,[28] EEOC argued and the Courts held that other types of benefits such as severance and layoff benefits were subject to the § 4(f)(2) standards even though these benefits were not specifically mentioned in the legislative history or in existing regulations. Perhaps more telling, however, is the introduction to the EEOC's own regulations which states:

> Although not specifically discussed herein, *other plans within section 4(f)(2)*, such as short-term disability and accidental death and dismemberment, *are subject to the same general principles*.

44 Fed. Reg. at 30653 (May 25, 1979) (emphasis added).

Second, the EEOC implies that it can create (or ask the court to create) an "exception" to the "equal benefit or equal cost" principle simply because other exceptions exist. This is incorrect both factually and legally. No other exceptions currently exist to the principle. The only exception, *see infra* at 22-23, which permitted employers to discontinue pension contributions at age 65, was expressly rejected by the EEOC because it was inconsistent with the "equal benefit or equal cost" principle governing Section 4(f)(2) benefit plans. *See AARP v. EEOC*, 655 F. Supp. 228 (D.D.C. 1987), *rev'd in part on other grounds*, 8 Empl. Ben. Cas. (BNA) 1969 (1987) (agency

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[28] *See infra* notes 8 and 9.

Chairman testifies before Congress that permitting employers to incur no cost for pension benefits for employees over age 65 is "facially inconsistent with the (Labor) Department's own long-standing administrative interpretation of the requirements of the ADEA's benefit provision").

In sum, the EEOC's position regarding an "exception" to § 4(f)(2) for retirement incentive benefits is not entitled to any deference from this court because it is: (1) based on a faulty legal premise concerning the "voluntary" nature of the challenged benefit, (2) inconsistent with judicial precedent regarding the use of economic considerations as a defense to overt age discrimination, and (3) inconsistent with the EEOC 's own long-standing, contemporaneous and consistent administrative regulations interpreting Section 4(f)(2) of the ADEA.

IV. Application of the "Equal Benefit or Equal Cost" Principle to the Challenged Benefit

In the event that the Court finds the challenged incentive is an "employee benefit plan" within Section 4(f)(2), the Court must apply the "equal benefit or equal cost" principle in assessing whether the exclusion of plaintiffs constitutes a "subterfuge." The simplicity of the test and the undisputed nature of the challenged benefit (a one-time lump sum) render the age-based exclusion of the plaintiffs a "subterfuge" as a matter of law.

Clearly, the defendants did not provide equal benefits. Under the "equal benefit or equal cost" principle, they can escape liability only upon a showing that they incurred equal costs in retirement incentives for the plaintiffs. For cash benefits such as the one challenged here, however, where the benefit to the employee and the cost to the employer are one and the same --- $10,000 ---, the defendant can never meet its legal burden of demonstrating equal cost.[29] Unlike life insurance or disability plans in which age related premium increases may justify age related benefit reductions, no such justification ever exists when the benefit is a one-time lump sum option. This fact is unchanged by the articulated "purpose" of the incentive - to induce the departure of older teachers - or by the "event" that triggers the benefit payment - retirement. While the "purpose" alone may not constitute evidence of age-based animus, it is irrelevant to the application of the "equal benefit or equal cost" principle. Likewise, as the Courts in Borden's and Westinghouse held, the fact that an economic decision (plant closings) triggered the benefits did not shield an otherwise arbitrary benefit exclusion based on age.

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[29] Indeed, it is this immutable characteristic of cash payments that led the courts in Borden's, Westinghouse and Alford to conclude that they were not the type of plans to which Section 4 (f)(2) applied. See infra notes 8, 9 and 10.

Clearly, an employer could not exclude older workers from a bonus payment designed to improve productivity on the general assertion that the older workers could not become more productive. So too here, the defendants cannot exclude the plaintiffs from a cash benefit based on the unsupported stereotype that they will be "working fewer years." See Arlene Knitwear, 454 F. Supp. at 728.

It is exactly these types of unsupported stereotypes which Congress intended to outlaw in the first instance by the incorporation of Section 4(f)(2) into the ADEA. The "equal benefit or equal cost" principle effectively eliminates these subjective criteria and sets forth the only permissible means of satisfying the "subterfuge" language of the exception. Simply put, an employer may not attempt to save money at the expense of its older workers.

Nor does the application of the "equal benefit or equal cost" principle work any hardship on the employer community.[30] As the EEOC points out, many retirement incentive programs already in use apparently provide equal benefits to all eligible employees (i.e. equal lump sums or equal years of service for pension purposes) and for that reason do not run afoul of the prohibitions of Section 4(a)(1) of the ADEA. Equally important, the "equal benefit or equal cost" principle will ensure that employers not apply mistaken (and unlawful) stereotypes about the "expected future service" of any older employees. See Arlene Knitwear, 454 F. Supp. at 728.

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[30] In recognition of the tremendous mobility of the work force overall, Congress recently amended ERISA to shorten the mandatory period of pension vesting from ten years to five. Pub. L. No. 99-514, § 1113. During the same session, Congress amended the ADEA to extend its protections to workers age 70 and older. Pub. L. No. 99-509, § 9201.

CONCLUSION

For the foregoing reasons, this Court must first determine whether the defendants' one-time retirement incentive is an "employee benefit plan" within the meaning of Section 4(f)(2) in light of the Supreme Court's decision in Fort Halifax. Should the court conclude that the challenged benefit is such a plan, it must then apply the "equal benefit or equal cost" principle to determine whether the age-based exclusion of the plaintiffs constitutes a "subterfuge." Based on the nature of the benefit, its complete denial to the plaintiffs could never be justified as a matter of law. Upon the submission of an appropriate motion the Court should enter summary judgment in favor of the plaintiffs on their ADEA claim.

Dated: September 15, 1987

Respectfully submitted,

Steven Zaleznick
Legal Counsel

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Christopher G. Mackaronis
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Worker Equity Department

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CERTIFICATE OF SERVICE

This is to certify that on September 15, 1987, copies of the foregoing "Brief *Amicus Curiae* of the American Association of Retired Persons" were served by postage pre-paid mailing to the following counsel of record:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and
JEUNE M. MILLER,

Plaintiffs,

-vs- CIV-84-80C

BOARD OF EDUCATION OF THE SCHOOL DISTRICT
OF THE CITY OF NORTH TONAWANDA, NEW YORK,
and NORTH TONAWANDA UNITED TEACHERS,

Defendants.

The court has now received an *amicus* brief from the American Association of Retired Persons on September 25, 1987 (Item 40), and has granted the application of that association for leave to file the brief *amicus curiae*.

The court has also received and filed a memorandum from the Equal Employment Opportunity Commission as *amicus* on August 3, 1987 (Item 36), and that brief shall also be considered by the court.

Previously, defendant North Tonawanda United Teachers had filed a reply memorandum on July 27, 1987 (Item 35). There is also pending a motion by the North Tonawanda United Teachers Association to amend the answer filed on July 6, 1987. The brief in opposition was filed by plaintiff on July 13, 1987 (Item 34).

It is important to determine whether any further briefing is required before a date for argument is set. Any further briefs to be filed shall be filed not later than November 12, 1987.

Because of the importance of the issue, it is urgent that this schedule be met. If the schedule is impractical or if there are other motions to be made, the court shall be notified forthwith so that a reasonable schedule may be attained.

The Clerk shall send notice to all parties and to the attorneys for *amicus*.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: October 2, 1987

Appendix V

DOCUMENTS PERTAINING TO DEVELOPMENT OF POLICY WITHIN THE EEOC REGARDING PENSION ACCRUAL, PENSION ACCRUAL AND APPRENTICESHIP PROGRAMS, AND WAIVERS

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED
1985 JUL -5 PM 2:48
OFFICE OF THE CHAIRMAN

JUL 3 1985

MEMORANDUM

TO: Clarence Thomas
Chairman

Tony E. Gallegos
Commissioner

William A. Webb
Commissioner

Fred W. Alvarez
Commissioner

R. Gaull Silberman
Commissioner

FROM: Allyson K. Duncan AKD
Acting Legal Counsel

SUBJECT: Notice of Proposed Rulemaking (NPRM) for an exemption allowing for waivers under the ADEA.

Due to the substantial interest that has been recently generated in the issue of waivers under the ADEA, this office has prepared an NPRM on the issue indicating the Commission's intention to recognize employee/employer waivers, unsupervised by the EEOC, so long as they are knowing and voluntary.

The standard for knowing and voluntary waivers as set forth in the preamble of the proposed NPRM is that established by court decisions under Title VII. While the specific criteria for what constitutes a knowing and voluntary waiver are left unstated, the NPRM solicites public comment on whether to establish more exact criteria, and, if so, what they should be.

Attached for your background information are a copy of Commission Silberman's June 17, 1985 memo to the Chairman and the General Counsel's January 30, 1984 memo to the Commission on the subject of waivers.

Attachments

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

TO: CLARENCE THOMAS
CHAIRMAN

FROM: R. GAULL SILBERMAN
COMMISSIONER

RE: REGULATORY WAIVER FOR VOLUNTARY SETTLEMENTS UNDER ADEA

DATE: JUNE 17, 1985

The Office of General Counsel and members of the public have asked us to consider a response to the recent Sixth Circuit ruling in Runyan v. NCR Corp., which held that voluntary settlements of ADEA disputes are unenforceable. I believe such a prohibition contrary to the policy of the Act and detrimental to the interests of both employers and employees. Moreover, the requirement that such settlements must be "supervised" (i.e., monitored and approved) by the Commission would unnecessarily compound the Commission's burdens. We may wish to consider a proposed rulemaking along the following lines.

Analysis

The courts have consistently recognized that Congress has "expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). Consequently, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., employers and employees may settle disputes provided that the waiver of rights and release of potential liability under the Act is "voluntary and knowing." Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974).

Congress did not explicitly address the issue of voluntary settlements when it enacted the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq. Nonetheless, the policy reasons in favor of encouraging voluntary settlements under Title VII apply with even greater force to the ADEA. The framers of the ADEA were concerned that delay would prejudice the claims of older workers, and one of their central goals was to ensure expeditious resolution of disputes and to avoid bureaucratic quagmires. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F. 2d 21, 24 n.2 (2d Cir. 1982). Thus, § 2(b) of the ADEA establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment."

Despite the strong public policy supporting the voluntary settlement of employment discrimination claims, the Sixth Circuit held in Runyan v. NCR Corp., No. 83-3862 (6th Cir. Apr. 22, 1985) that the ADEA precludes all voluntary settlements. Because § 7(b) of the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 211(b), 216, and 217), the Sixth Circuit relied on cases construing those provisions as they relate to the minimum wage requirements of the FLSA.

In both cases, the Supreme Court addressed the question of whether the right to liquidated damages under the FLSA may be waived. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the Court explained that the purpose of the FLSA was to offset the unequal bargaining power of employers with respect to certain issues, specifically minimum wages and maximum hours. Because these damages are automatic, the Court assumed that no employee would waive them unless the employer applied its superior bargaining power. Thus, where the employer's liability under the Act is clear, the Court concluded that any waiver of rights would frustrate the purposes of the FLSA.

In *D.A. Schulte, Inc. v. Gangi*, the Court extended the settlement prohibition to cases in which there is a dispute over the FLSA's coverage, again based on the automatic nature of the rights conferred by the Act. However, the Court explicitly left open the issue of settlements where the facts underlying the claim are the subject of a bona fide dispute. Moreover, the Court premised its decisions in both cases on the unique absolute nature of the minimum wage provisions, and did not consider the contervailing goals of efficiency and voluntary resolution of disputes embodied in the ADEA.

In *Runyan*, the Sixth Circuit broadly applied these FLSA precedents to set aside a settlement of an ADEA dispute, holding that a release for valuable consideration is prohibited even where the waiver of rights is voluntary and knowing. In so doing, the Sixth Circuit overlooked two critical objectives of the ADEA: encouraging employers and employees to find ways to resolve disputes arising under the Act, (*see* § 2(b)), and ensuring the expeditious resolution of such disputes without the additional layer of bureaucracy that would result if supervision of such agreements by the Commission is required. *See* Remarks of Sen. Javits, *supra*; *Burns v. Equitable Life Assurance Society*, *supra*.

Plainly, the blanket prohibition against ADEA settlements imposed by *Runyan* will frustrate the interests of both employees and employers. The remedial purposes of the Act will be better served by allowing settlements whenever employees and employers perceive them to serve their mutual needs, provided that waivers of rights under the ADEA are voluntary and knowing.

Accordingly, the Commission should exercise its discretion pursuant to § 9 of the ADEA to issue an exemption to the provisions of § 7 of the Age Discrimination in Employment Act for any voluntary settlement in which the waiver of rights and release from liability by the employee under the Act is voluntary and knowing. In determining whether such a waiver and release is knowing and voluntary, the same standards and procedures applied for such settlements under Title VII of the Civil Rights Act of 1964 should pertain. Where the waiver and release is knowing and voluntary, the settlement should provide a complete defense to a charge or action based on the rights that were waived.

cc: Commissioners
Office of General Counsel
Office of Legal Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

30 JAN 1984

MEMORANDUM

TO : Clarence Thomas, Chairman
Cathie A. Shattuck, Vice Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner

FROM : David L. Slate
General Counsel

RE : Recommendation to Consider Promulgation of a Procedural Regulation Dealing with Waiver of Private Rights Under the ADEA

This is to recommend that the Commission consider the advisability of promulgating a procedural regulation dealing with waiver of private rights under the Age Discrimination in Employment Act (ADEA). The issue of waiver of ADEA rights is, at least tangentially, before the Commission in a case which the Office of General Counsel has recommended for litigation. See Presentation Memorandum and supporting documentation in the McGraw-Edison Company case (Charge No. 034-83-1446, et al.).

The Office of General Counsel (OGC) believes that, absent procedural regulations to the contrary, waiver of private ADEA rights is prohibited, except in cases where the Commission supervises a settlement agreement. See McGraw-Edison memorandum, January 25, 1984, at pages 3-4. This rule is based on statutory language and caselaw incorporated into the ADEA from the Fair Labor Standards Act.

The rule against waiver of ADEA rights, if sustained by the courts, could have consequences which the Commission may not wish to promote. For example, such a rule may discourage employers from entering into voluntary agreements with employees to sever their employment relationship upon payment of substantial sums in exchange for express, non-prospective waivers of ADEA claims. This, in turn, could result in more involuntary terminations without severance benefits and also, therefore, more ADEA charges.

The rule against waiver of ADEA rights is different from that which the courts have developed under Title VII of the Civil Rights Act of 1964. See McGraw-Edison memorandum, footnote at pages 3-4. The rule under Title VII, as summarized in one recent appellate decision, is that a non-prospective waiver or release of Title VII claims, knowingly and voluntarily entered into by an employer with an employee, will be given effect absent vitiating circumstances surrounding its execution, such as fraud, duress, lack of consideration, or mutual mistake of fact.

In view of the differences between Title VII and the ADEA respecting the waiver of private rights, OGC recommends that the Commission consider whether it wishes to promulgate a procedural regulation dealing with waiver of private ADEA rights.* In this regard, we have not been able to identify any policy reason for restricting the waiver of ADEA rights to a greater extent than similar rights may be waived under Title VII.

cc: Constance L. Dupre
Legal Counsel

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* Section 9 of the ADEA, 29 U.S.C. §628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. The differences between such interpretive guidelines and legislative regulations are significant. Legislative regulations have the force and effect of law, and are binding on the courts subject to review only under an arbitrary and capricious standard. Interpretive guidelines do not have the force of law and, although entitled to great deference, the courts are free to adopt contrary interpretations. Moreover, while legislative regulations are valid only if promulgated after appropriate notice and a period for public comment, interpretive guidelines may be issued without notice and comment.

Section 9 of the ADEA also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest" (29 U.S.C. §628). The rule against waiver of private ADEA rights is largely a statutory one. See ADEA Section 7(b), which incorporates by reference Section 16(c) of the Fair Labor Standards Act, 29 U.S.C. §216(c), as well as the pre-ADEA caselaw interpreting that provision. Accordingly, if the Commission decides to modify the present rule against waiver of private ADEA rights, it might be advisable to both issue an exemption and promulgate a procedural regulation pursuant to Section 9 of the ADEA.

The procedures for issuing exemptions and promulgating regulations under Section 9 of the ADEA are discussed at some length in the memorandum and briefing book which OGC submitted to the Commission with regard to the ADEA interpretive guideline on apprenticeship programs. See memorandum, Slate and Dupre to the Commission, October 11, 1983.

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Administrative Exemption allowing for waivers under the ADEA.

Agency: Equal Employment Opportunity Commission

Action: Notice of Proposed Rulemaking

Summary: The Commission hereby provides notice of its intention to promulgate an administrative exemption and legislative regulation (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. Section 1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

Dates: Comments must be received on or before (60 days from publication) 1985.

Address: Comments should be addressed to the Office the Executive Secretariat, Room 507, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20507.

For Further Information Contact: John K. Light, (202) 634-6690.

Supplementary Information: Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission has decided to promulgate an administrative exemption and legislative regulation under Section 9 of the ADEA and 29 C.F.R. Section 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. §621 *et seq*.

Courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, has provided that employers and employees may settle disputes as long as the waiver of rights and release of potential liability is voluntary and knowing. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 52 n. 15 (1974); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. *See* 29 U.S.C. §626(d). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

Section 2(b) of the Act firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." While Congress did not explicitly address the issue of voluntary settlements without government supervision when it enacted the ADEA, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); *Burns* v. *Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2nd Cir. 1982).

Section 7(b) of the ADEA, however, incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA). In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA caselaw dealing with enforcement of FLSA rights were incorporated into ADEA Section 7(b). The case law dealing with contractual waivers of FLSA rights does not permit waivers without government supervision. *Brooklyn Savings Bark v. O'Neil*, 324 U.S. 697 (1945); *Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946). Application of FLSA enforcement provisions to the ADEA may be interpreted to mean that individuals may not waive their rights or release potential liability even if the action is voluntary and knowing, except under EEOC supervision.

The policy that requires government supervision of releases and waivers is at odds with one that encourages expeditious resolution of disputes. Clearly, the blanket prohibition against non-government supervised ADEA settlements thus frustrates the interests of both employees and employers.

The Commission believes that the remedial purposes of the Act will be better served by allowing settlements whenever employees and employers perceive them to serve their mutual needs, provided that such waivers of rights under the Act are voluntary and knowing. The Commission hereby provides notice of its intention to adopt a rule allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is voluntary and knowing.

The Commission expects that reviewing courts will apply such standards as are applicable to Title VII waivers under current case law in determining the "knowing and voluntary" nature of those waivers under the ADEA. *See Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1981); *EEOC v. T.I.M.E. - D.C. Freight Inc.*, 659 F.2d 690 (5th Cir. 1981); *Cox v. Allied Chemical Corp.*, 538 F.2d 1094 (5th Cir. 1976), *cert. denied*, 434 U.S. 1051 (1978).

The Commission hereby solicits comment on the appended proposed rule allowing unsupervised waivers and releases of private rights under the ADEA so long as they are knowing and voluntary. In addition, the Commission requests comment on whether it should establish explicit criteria for what constitutes a knowing and voluntary waiver, and, if so, what criteria it should establish.

Impact Analysis - This amendment will not result in a annual economic effect of $100 million or more as that term is used in Executive Order 12291.

Similarly, the Commission certifies under 5 U.S.C. §605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission purposes to amend 29 CFR §1627.16 by adding a new subsection (c) to read as follows:

§1627.16 Specific exemptions.

. . . .

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to exempt from the prohibitions of the Act waivers and releases of private rights entered into without Commission supervision. Employers and employees/applicants may enter into agreements that provide for the waiver and release of private rights under the Act provided that such releases are knowing and voluntary.

Signed on _______ Day of ______ 1985 at Washington, D.C.

For The Commission

Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED
1985 JUL 15 PM 2:32
OFFICE OF THE CHAIRMAN

JUL 15 1985

MEMORANDUM

TO : Clarence Thomas
Chairman

Tony E. Gallegos
Commissioner

William A. Webb
Commissioner

Fred A. Alvarez
Commissioner

R. Gaull Silberman
Commissioner

FROM : Allyson K. Duncan akd
Acting Legal Counsel

SUBJECT : Supplementary Memorandum on Notice of Proposed Rulemaking (NPRM) for an exemption allowing for waivers under the ADEA.

Since this NPRM was submitted to you on July 11, we have made additional modifications after discussion between staff of this office and members of the staffs of various Commissioners. These modifications are set forth on the page immediately following this one and are incorporated in the clean copy of the NPRM that also is attached.

Attachment

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

Proposed Revised NPRM Language

1. Substitute the present last paragraph on p. 3 (extending to p. 4) with the following:

> The Commission believes that the remedial purposes of the Act will be better served by allowing agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are voluntary and knowing. The enforcement provisions of FLSA that are incorporated into ADEA must be viewed in the context of the different policy considerations underlying the two acts. Although under FLSA there is an absolute presumption that any waivers of minimum wage rights would necessarily be based upon unequal bargaining power and duress, see Brooklyn Savings Bank v. O'Neil, supra, this reasoning does not apply to ADEA. As earlier noted, one purpose of ADEA is to encourage voluntary and expeditious resolution of disputes. Thus, ADEA is analagous to Title VII in this respect, and accordingly the standards governing Title VII waivers should govern waivers under ADEA.

2. Substitute the second sentence of the last paragraph on p. 4 with the following:

> The Commission recognizes that existing Title VII law may not address unique issues that may arise in the context of ADEA waivers, and thus specifically requests comment on whether it is necessary to develop particular standards to determine whether ADEA waivers are "knowing and voluntary" and, if so, what those standards should be.

3. On p. 5, substitute the words "in settlements" from the first sentence of the proposed rule with "of claims."

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Administrative Exemption allowing for waivers under the ADEA.

Agency: Equal Employment Opportunity Commission

Action: Notice of Proposed Rulemaking

Summary: The Commission hereby provides notice of its intention to promulgate an administrative exemption and legislative regulation (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. §1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

Dates: Comments must be received on or before (60 days from publication) 1985.

Address: Comments should be addressed to the Office of the Executive Secretariat, Room 507, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20507.

For Further Information Contact: John K. Light at (202) 634-6690.

Supplementary Information: Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission has decided to promulgate an administrative exemption and legislative regulation under Section 9 of the ADEA and 29 C.F.R. §1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. §621 et seq.

Courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., has provided that employers and employees may settle disputes as long as the waiver of rights and release of potential liability is voluntary and knowing. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 52 n. 15 (1974); Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. §626(d). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

Section 2(b) of the Act firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C.§621(b). While Congress did not explicitly address the issue of voluntary settlements without government supervision when it enacted the ADEA, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2nd Cir. 1982).

Section 7(b) of the ADEA, 29 U.S.C. §626(b), however, incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, et seq. In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). The case law dealing with contractual waivers of FLSA rights does not permit waivers without government supervision. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). Application of FLSA enforcement provisions to the ADEA may be interpreted to mean that individuals may not waive their rights or release potential liability even if the action is voluntary and knowing, except under EEOC supervision. See 29 U.S.C. §216(c).

The policy that requires government supervision of releases and waivers is at odds with one that encourages expeditious resolution of disputes. Clearly, the blanket prohibition against non-government supervised ADEA settlements thus frustrates the interests of both employees and employers.

The need for an administrative exemption has been highlighted by the decision in Runyan v. National Cash Register Corp. 759 F. 2d 1253 (6th Cir., April 22, 1985), rehearing en banc granted (June 17, 1985), which reversed a district court decision upholding an ADEA waiver based on well established Title VII standards. See 573 F. Supp. 1454 (S.D. Ohio, 1983). In Runyan, a divided panel of the Sixth Circuit "h[e]ld that ADEA rights cannot be waived by a private unsupervised release." 759 F. 2d at 1254.

The Commission believes that the remedial purposes of the Act will be better served by allowing agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are voluntary and knowing. The enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Although under the FLSA there is an absolute presumption that any waivers of minimum wage rights would necessarily be based upon unequal bargaining power and duress. (see Brooklyn Savings Bank v. O'Neil, supra), this reasoning does not apply to the ADEA. As earlier noted, one purpose of the ADEA is to encourage the voluntary and expeditious resolution of disputes. Thus, the ADEA is analogous to Title VII in this respect, and accordingly the standards governing Title VII waivers should govern waivers under the ADEA.

The Commission hereby provides notice of its intention to adopt a rule allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is voluntary and knowing.

The Commission expects that the same standards that are applicable to Title VII waivers under current case law will apply to ADEA waivers. Under Title VII, waivers are deemed to be knowing and voluntary if they clearly provide actual notice of the nature of the rights that are waived and are freely negotiated without fraud or duress. See Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E. - D.C. Freight Inc., 659 F.2d 690 (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975).

The Commission hereby solicits comment on the appended proposed rule allowing unsupervised waivers and releases of private rights under the ADEA so long as they are knowing and voluntary. The Commission recognizes that existing Title VII law may not address unique issues that may arise in the context of ADEA waivers, and thus specifically requests comment on whether it is necessary to develop particular standards to determine whether ADEA waivers are "knowing and voluntary" and, if so, what those standards should be.

Impact Analysis - This amendment will not result in an annual economic effect of $100 million or more as that term is used in Executive Order 12291.

Similarly, the Commission certifies under 5 U.S.C. §605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission proposes to amend 29 CFR §1627.16 by adding a new subsection (c) to read as follows:

§1627.16 Specific exemptions.

. . . .

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary. No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act.

Signed on ______ Day of ______ 1985 at Washington, D.C.

For The Commission

Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

K+A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

July 12, 1985

MEMORANDUM

TO : Clarence Thomas, Chairman
Tony E. Gallegos, Commissioner
William A. Webb, Commissioner
Fred Alvarez, Commissioner
Ricky Silberman, Commissioner

FROM : Cynthia C. Matthews, Executive Officer
Executive Secretariat

SUBJECT : Commission Meeting -- July 16, 1985 -- 9:30 A.M.
Open Session

Attached are modifications to Item 3, Notice of Proposed Rulemaking for an an Exemption Allowing for Waivers Under the ADEA, that resulted from the Special Assistant's Meeting on July 10, 1985.

Attachment

12-2-85

The Executive Secretariat
Room 507
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20507

Re: CFR Part 1627
Proposed Rule to Allow for
Waivers Under the ADEA

Dear Sir or Madam:

These comments are submitted in respose to the Notice of Proposed Rulemaking to Amend Title 29 CFR Part 1627, appearing in the Federal Register for October 7, 1985. This submission is made on behalf of the Gray Panthers Advocacy Committee, its members, and older workers whose interests will be affected adversely by the proposal. The proposed rule draws several objections:

(1) Waivers and releases under the ADEA involve inherently coercive situations;

(2) The proposal is drafted so broadly that it would apply to prospective waivers and releases of important substantive rights under the Age Discrimination in Employment Act, and would not be limited merely to settlement of claims for past injuries under the Act;

(3) The proposal reflects a policy choice made by the Equal Employment Opportunity Commission (the EEOC) which directly contravenes the Act's purposes;

(4) The proposed rule does not actually further the Commission's ostensible reasons for proposing it;

(5) The EEOC lacks the legal power to make the proposed change;

(6) The EEOC fails to demonstrate why this is not a "major rule" for which a regulatory impact analysis is required. The above comments are discussed separately below.

1. Waivers and releases under the ADEA involve inherently coercive situations.

The proposal would encourage private waivers and releases of ADEA rights, if "knowing and voluntary," without EEOC supervision. The vast majority of such waivers and releases cannot clearly be said to be "knowing and voluntary," however, because of inherent duress on the employee in such situations.

Waivers and releases will be extracted from older workers whose job tenure is insecure, whose future employability is doubtful, and whose retirement security is fragile.

Under the proposal, workers' receipt of benefits to which they are entitled will become conditional: They will be told, "You'll get your severance pay if you sign this release;" or "You'll be recalled from layoff when you sign this waiver;" or "You'll get your pension when you agree to a settlement." It is not rational to authorize "knowing and voluntary" waivers and releases in employment settings where the very element of "knowing and voluntary" action is implicitly suspect.

2. The proposed rule, if adopted, would permit employers to extract concessions of important substantive rights from employees on a prospective and wholesale basis.

The proposed exemption would permit waivers or releases of claims under the Act without the Commission's supervision or approval. The Supplementary Information describes the proposal as a narrow and technical exemption. If adopted, however, the proposal would create a loophole under the Act large enough to swallow the Act's basic protections.

For example, the proposal would permit an employer to extract a waiver from each new employee of any or all rights under the Act. An employer could ask a job applicant to stipulate that the applicant, if hired, would retire at age 65.

Similarly, an employer could extract a waiver of rights under the ADEA from employees at a time when a work unit is threatened with a reduction in force. Employees could be asked to agree to accept month-to-month employment; or to forego seniority based raises; or to work only for a short term.

As it stands, the proposal is extremely ambiguous about the scope of its coverage. If the proposal covers prospective and wholesale waivers and releases, then it should so specify. If the proposal is more limited, then it must say how it is limited, and with particularity. Any proposal must delineate carefully the limitations on the exception being proposed. In all events, the proposal must be republished with greater clarity in order for meaningful public comment to occur.

3. The proposal departs from the statutory scheme.

The ADEA, 29 U.S.C. 628, grants the Commission authority to create exemptions to the Act's provisions as it "may find necessary and proper in the public interest." The Commission has not demonstrated, nor even articulated, what public interest permits it to negate a clear Congressional intention to create a remedial scheme directly contrary to that which the Commission now proposes.

The Commission here is attempting to insert its policy opinions in place of Congressional determinations already enshrined in the ADEA. The Commission apparently prefers the enforcement provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et. seq., to the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 216. The difficulty with this approach is that FLSA statutory enforcement provisions and FLSA case law dealing with enforcement of statutory rights are incorporated into the ADEA. Lorillard v. Pons, 434 U.S. 575 (1978). Nothing in the ADEA nor its legislative history suggests that the "public interest" basis for creating exemptions under the Act constitutes a blanket authority for the present Commissioners to interpose their personal judgments for Congressional judgments already codified in law.

4. The Commission fails to demonstrate how the proposal will carry out its asserted rationale.

The only stated reason for the proposal in the Supplementary Information is that it will "ensure expeditious resolution of disputes." However, the Commission fails to demonstrate how this will occur in practice or how any expedition in dispute resolution will outweigh the loss of protections to workers whose rights are waived. The EEOC fails to show (1) why it cannot continue supervising such waivers, (2) the number of such waivers yearly, and (3) why the processing time for approval is not negligible.

Actual cases under the proposal will arise in a variety of settings. In one setting a complainant under the ADEA will be represented by a lawyer or other representative such as a shop steward. Presumably in these cases the proposed settlement will be set out concisely and its fairness features will be evident on the face of the documents, thus facilitating EEOC approval.

In other settings the claimant will be unrepresented. If that claimant is sufficiently informed of ADEA rights, and if the proposed settlement is carefully prepared, then EEOC review can be prompt. In other cases, review will be more extensive because the proposed settlement is not concisely prepared, and its "knowing and voluntary" nature does not readily appear from the documents under review. It is precisely in these situations, however, where EEOC review is critical to protect the individual claimant and to resolve the dispute. To refuse EEOC supervision in these cases where a proposed settlement, on its face, is not "knowing and voluntary" will invite litigation over the issue. It will protract disputes for months and years. This result directly contravenes the Commission's ostensible rationale for its proposal.

The Commission simply fails to demonstrate how a policy which promotes unsupervised waivers and releases actually encourages the expeditious resolution of disputes. Indeed, its proposal creates a risk of far more disputes and delay in their resolution than with EEOC supervision. Instead of providing a prompt and certain approval process within the EEOC, the proposal will create confusion, turmoil, and uncertainty which will force parties to resort to litigation to determine the validity of the settlement agreement.

Courts consistently require agencies to set forth the legal and policy rationale when publishing proposed rules. Portland Cement Association v. Ruckelshaus, 486 F.2d 378 (D.C. Cir. 1973); Weyerhauser Company v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Home Box Office v. FCC, 567 F.2d 90 (D.C. Cir. 1977). The failure of the Commission to describe its legal and policy rationale with any particularity renders the proposal procedurally defective.

5. The Commission fails to demonstrate its legal authority to adopt the proposal in question.

The Supplementary Information states that the Commission "has decided to promulgate an administrative exemption and legislative regulation." On anaylsis, however, the Commission fails to demonstrate how the proposal at issue constitutes either an exemption or a legislative regulation.

An administrative "exemption" creates a narrow and discrete exception to coverage of the statute. An exception may apply to a set of defined employees, 29 C.F.R. 1625.11; to bona fide executive or high policy making employees, 29 C.F.R. 1625.12; or persons in apprenticeship programs, 29 C.F.R. 1625.13. Alternatively, an exemption may be created for specific employers, such as activities encouraging employment of persons with special problems. 29 C.F.R. 1627.16.

The instant proposal is not an "exemption" by any stretch of the English language. Rather, it purports to authorize every employer in every industry to extract waivers and releases from every employee under every circumstance. This proposal exceeds the authority of the Commission to issue particular exemptions and instead it attempts a wholesale modification of the Act itself.

Nor is this proposal a legislative rule. Legislative rules "grant rights, impose obligations, or produce other significant effects on private interests." Batterton v. Marshall, 648 F.2d 694, 701-702 (D.C. Cir. 1980). Such rules bind a court with the force of law. 2 K. Davis, Administrative Law Treatise, Section 7:13 at 59 (2d ed. 1979).

However, a legislative rule can be issued only where Congress has delegated power to an agency to issue regulations in that area. Joseph v. U.S. Civil Service Commission, 554 F.2d 1140, 1154, n.26 (1977). While rule-making under general grants of authority has been upheld, regulations issued under such authority will be legislative only if "reasonably related to the purposes of the enabling legislation period", Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 280-281 (1969); Mourning v. Family Publication Service, Inc., 411 U.S. 356, 370 (1973), quoting Thorpe. To be legislative, a regulation must be reasonably within the contemplation of Congress in its delegation of rule-making authority. Chrysler Corporation v. Brown, 441 U.S. 280, 308 (1979).

The issue in Chrysler closely parallels the attempt by the Commission to seize legislative rule-making authority here. That case involved the question of whether regulations promulgated by the Department of Labor were legislative for purposes of the Freedom of Information Act, 5 U.S.C. 552. The Department of Labor argued that the regulations which required disclosure of certain business practices and statistics exempted from disclosure under the Trade Secrets Act, were authorized by 42 U.S.C. § 2000(e). This statute, codifying Section 201 of Executive Order 11246, directs the Secretary of Labor to:

> adopt and issue such orders as he deems necessary and appropriate to achieve the purposes thereof (ending discrimination by the federal government and those who deal with it). 441 U.S. at 283.

The Court rejected this argument, reasoning that in enacting the Executive Order program, Congress was not concerned with public disclosure of trade secrets. No nexus between the regulations and a delegation of the requisite legislative authority by Congress could be found, resulting in the regulations taking interpretive, not legislative, status. 441 U.S. at 304.

Congress has authorized the EEOC to issue only "such rules and regulations as it may consider necessary or appropriate for carrying out this chapter...." 29 U.S.C. 628. The Act confers no power on the Commission to issue rules creating new law, but only to issue rules enforcing existing law. To the contrary, Congress has mandated enforcement under the ADEA by reference to the remedial framework contained in the Fair Labor Standards Act, 29 U.S.C. 216; 29 U.S.C. 626(b). The statute contains no authorization to the Commission through legislative rule making or other means to alter this remedial scheme.

The Supplementary Information is totally ambivalent on whether the proposal constitutes an "exemption" or a "legislative rule" and suggests uncertainly on the part of the Commission about its legal basis, if any, for proceeding. The Commission at the threshold has a duty to identify the nature of its proposal in this regard and precisely its legal authority to proceed. To continue on its present course with this proposal "would do violence to established principles of separation of powers" condemned by the Supreme Court in Chrysler Corporation v. Brown, supra, 441 U.S. at 308.

6. A regulatory impact statement is required.

The Commission states that the proposed rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Commission, however, fails to state what data it reviewed, if any, in reaching this conclusion or what information exists in support of this conclusion. The Commission either must prepare a regulatory impact statement or must demonstrate factually the basis for its failure to do so.

CONCLUSION

For all of the foregoing reasons, we urge the prompt withdrawal of the proposed rule. At the very least, the proposal must not go forward without a substantial revision of the proposal, clarification of its scope, and legally sufficient explanation of its rationale.

Respectfully submitted,

GRAY PANTHERS ADVOCACY COMMITTEE

By: Burton D. Fretz
BURTON D. FRETZ

AARP

December 13, 1985

Office of the Executive Secretariat
Room 507
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20507

Dear Sir/Madam:

Enclosed please find a corrected copy of the Comments of the American Association of Retired Persons to the EEOC with regard to the Notice of Proposed Rulemaking issued October 7, 1985. 50 Fed. Reg. 40870.

Please substitute these corrected comments for our comments submitted on December 6, 1985.

Very truly yours,

Sana F. Shtasel

SFS/paw
Enclosure

COMMENTS OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO NPRM TO PROMULGATE AN ADMINISTRATIVE EXEMPTION LEGALIZING UNSUPERVISED WAIVERS UNDER THE ADEA

50 Fed. Reg. 40870

October 7, 1985

INTRODUCTION

These comments are filed on behalf of the American Association of Retired Persons("AARP"), a not-for-profit membership organization of more than 20 million persons over the age of 50. AARP is the largest membership organization in the United States and almost 5 million AARP members are active participants in the labor force. AARP seeks to enhance the quality of life for older persons; promotes the independence and dignity of older persons; represents the interests of older workers; plays a leading role in shaping the role and place of older persons in society; and sponsors research on physical, psychological, social, economic and other aspects of aging.

On October 7, 1985, the EEOC issued a Notice of Proposed Rulemaking ("NPRM") to "promulgate an administrative exemption and legislative regulation . . . allowing for non-EEOC supervised waivers and releases of private rights under the ADEA." 50 Fed. Reg. 40870. The proposed rule would permit an employer and an individual employee to negotiate a binding release of the employee's existing or potential claims under the Age Discrimination in Employment Act, 29 U.S.C. sec. 621 *et seq.* ("ADEA") without the supervision of the EEOC. These comments address both the legality of the proposed rule and its effect on those persons protected by the ADEA.

AARP opposes the proposed rule as (1) contrary to the statutory language and legislative history of the ADEA and hence beyond the scope of the EEOC's administrative authority; (2) an improper use of the EEOC's authority under sec. 9 of the ADEA to grant exemptions from the requirements of the statute; (3) improperly elevating a general preference for voluntary settlement above the specific statutory policies requiring EEOC involvement in the conciliation process; and (4) overly-broad, unworkable and imposing increased burdens upon victims of age discrimination that are neither warranted nor permitted by the statute.

SUMMARY OF COMMENTS

This attempt by the EEOC to legalize unsupervised waivers and releases of ADEA rights raises significant legal concerns regarding the permissible scope of administrative discretion and the relationship between the ADEA, Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e *et seq.*, and the Fair Labor Standards Act of 1938, 29 U.S.C. §201 et seq. ("FLSA"). First, in proposing to legalize unsupervised waivers, the EEOC completely disregards Congress' intentional incorporation of the enforcement procedures of the FLSA into the ADEA ~~as the sole mechanism for~~ dispute resolution. The legislative history of the ADEA and cases interpreting the statute highlight the fact that Congress intended for the FLSA procedures, not Title VII procedures, to govern enforcement of the ADEA. Therefore, the proposed rule's substitution of the less-rigorous Title VII standards for valid waivers directly conflicts with the language and legislative history of the ADEA.

Second, the EEOC improperly invokes its authority under section 9 of the ADEA to establish exemptions from the requirements of the statute by proposing an "exemption" that, in reality, constitutes an across-the-board reversal of one of the statute's specific requirements. The Agency's limited exemption authority may not be used to second-guess Congress as to the appropriate mechanisms for enforcing the ADEA. Nor may it be used to grant ambiguous, overly-broad and unworkable exemptions such as the one proposed.

Third, the EEOC improperly elevates a policy preferring voluntary settlement and its desire for prompt resolution of claims above the clear statutory policy requiring the EEOC to actively protect the rights of ADEA claimants in conciliations. Congress has already decided that any adverse effect on voluntary settlements is outweighed by the important role played by the EEOC in protecting the older worker in circumstances in which the employee has inherently unequal bargaining power. Furthermore, in more than 18 years of enforcement activity, neither the EEOC nor the Department of Labor have reported any empirical data supporting the EEOC's assumption that its supervision frustrates voluntary settlements or causes "serious delays" in the resolution of claims.

Finally, the proposed rule would adversely affect the rights of, and impose substantial burdens upon, victims of age discrimination in a manner not intended by Congress. The proposed rule thus ignores Congress' recognition of the need for heightened protection of the rights of older workers under the ADEA, who are often unaware of -- or unable to assert -- their rights under this and other laws.

COMMENTS

A. The ADEA Prohibits Unsupervised Waivers and Releases

Congress examined several enforcement mechanisms when considering a model for redressing claims of age discrimination.1 / Although certain substantive provisions of the ADEA were taken in haec verba from Title VII, e.g., the prohibition against discriminatory employment practices, Congress expressly rejected the Title VII enforcement procedures. Instead, Congress incorporated into the ADEA the higher level of protection afforded to employees by the procedures for enforcing the FLSA, including the FLSA's prohibition against unsupervised waivers (FLSA Sec. 16(c)).2 / Section 7(b) of the ADEA, 29 U.S. sec. 626(b), thus incorporates sections 11(b), 16 (except for subsection (a)) and 17 of the FLSA as the sole and exclusive enforcement mechanism for claims arising under the ADEA.3 /

The Supreme Court has emphasized the differences in ADEA and Title VII enforcement procedures. In Lorillard v. Pons, 434 U.S. 575 (1978) the Court rejected the petitioner's (employer's) argument that notwithstanding its incorporation of the FLSA, which permits jury trials, the ADEA does not provide for them because Title VII does not provide for jury trials:

> . . . [T]o the extent petitioner correctly interprets congressional intent with respect to jury trials under Title VII, the very different remedial and procedural provisions under the ADEA suggests that Congress had a very different intent in mind when drafting the later law [the ADEA].

434 U.S. at 585 n. 14.4/
The Court, reviewing the legislative history of the ADEA, found that when developing the enforcement mechanism for the ADEA Congress had first reviewed Title VII and the National Labor Relations Act before settling on the FLSA. 434 U.S. at 577-80.

> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.

343 U.S. at 582.
Lorillard thus prohibits reference to Title VII as justification for any regulatory proposal that would deny victims of age discrimination the full procedural protections of the ADEA.

Section 16(c) of the FLSA establishes the only circumstances under which an employee may waive his or her rights under the statute: a waiver is effective only when supervised by the Secretary of Labor. By virtue of the ADEA's incorporation of sec. 16(c) of the FLSA, the same requirements are therefore established for valid waivers of an employee's rights under the ADEA: a waiver is effective only when supervised by the EEOC (the enforcing agency for the ADEA).5/

The legislative history of the FLSA makes clear that Congress believed that the limitations on waiver were necessary to protect employees in their negotiations with employers, because employees are at a disadvantage in the bargaining relationship. *See* H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9; S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3, 4 *cited in* *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n. 18 (citations to Congressional Record omitted).
See also *Schulte Co. v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Savings Bank*, 324 U.S. at 706-10 (discussing limitations on waivers). In *Lynn's Food Stores, Inc., v. United States*, 679 F.2d 1350, 1352-55 (11th Cir. 1982), the court emphasized

the unenforceability of unsupervised waivers: "There are only two ways in which. . . claims arising under the FLSA can be settled or compromised by employees": either by waivers supervised as required under section 16(c) or settlements supervised by a federal district court after suit has been filed under the statute.

The Supreme Court's holding in Lorillard pre-empts any argument that Congress did not intend this interpretation to be applied to the ADEA's incorporation of the FLSA's waiver requirements. In addressing the petitioner's argument regarding the right to jury trial under the ADEA, which was almost identical to the argument made by the EEOC in support of this NPRM, the Court held:

> Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law [FLSA], at least insofar as it affects the new statute [ADEA].

434 U.S. at 581.6 / Furthermore, as discussed at pp. 13-15 infra, Congress clearly believed that older workers, like other workers protected by the FLSA, are especially vulnerable in any negotiation process with an employer.

Lorillard is especially applicable to this proposed rule because it highlights the fact that ADEA complainants enjoy certain procedural rights and protection of the EEOC, that are not enjoyed by Title VII complainants. See also, e.g., Sedlacek v. Hack, 752 F.2d 333 (8th Cir. 1985) (The EEOC is obligated to engage in conciliation efforts on behalf of an ADEA complainant, but not on behalf of a Title VII complainant.). The holding in Lorillard compels the conclusion that Congress intended to incorporate and give full effect to the FLSA's prohibition against unsupervised waivers into the ADEA. The EEOC does not have the administrative authority to negate that requirement. See Dickerson v. City Bank & Trust, 575 F.Supp. 872, 875 (D.C.Kan. 1983) (EEOC regulations may not conflict with the language of the statute.).

B. The Proposed Rule is An Improper Exercise of the EEOC's Exemption Authority Under Section 9 of the ADEA.

The EEOC relies upon its authority under Section 9 of the ADEA, 20 U.S.C. sec. 628, to "establish such reasonable exemptions to and from any or all provisions of this chapter as the [EEOC] may find necessary and proper in the public interest" to issue this proposed rule. The proposed rule, however, does not establish a limited exception to the statute, but rather reverses a basic procedural requirement imposed by Congress. The proposed rule is therefore an inappropriate and overbroad use of the Agency's authority under section 9.

The Supreme Court has repeatedly held that the ADEA must be interpreted to apply in as broad a fashion as possible. Any exemptions under section 9 to the requirements of the statute or to its application must be limited in scope, narrowly applied and bear a heavy burden of justification.7 / Exemptions are to be granted only in discrete and well-defined circumstances in which it is shown that it is impractical or impossible to comply with the statute. See Johnson v. Baltimore, --U.S.--, 86 L.Ed.2d 286 (1985); Western Air Lines v. Criswell, --U.S.--, 86 L.Ed.2d 321 (1985).8 /

It is clear that the exemption authority under section 9 may not be used to second-guess Congress' determinations as to the requirements and scope of the statute. See Dickerson v. City Bank & Trust, 575 F.2d at 875. For the same reason the Agency cannot issue a rule negating the protections of the statute for persons between the ages of 65 and 70, it cannot issue a rule negating the protection offered to age discrimination victims by the EEOC's supervision of waivers of their rights under the ADEA.

Furthermore, unlike existing statutory exemptions, or exemptions that the EEOC is permitted to grant on a case-by-case basis, the proposed rule is unacceptably ambiguous. Its open-ended nature with regard to the type, scope and duration of permissable unsupervised waivers renders it impractical and unworkable. It does not clearly identify the affected employees (e.g., bona fide executives) and specify the permissable conduct (e.g., involuntary retirement at age 65.)9 /

For example, the proposed rule fails to specify exactly who or what is exempted from the statute's requirement of supervised waivers. Is the agreement itself exempted from the provisions of the ADEA; or is the employee who executes it; or is the employer? Can it be used as a condition of employment? Is the waiver limited to ADEA claims existing at the time it is executed or does it extend to prospective claims? If the latter, is it not contrary to public policy to relieve an employer of his obligations under the ADEA to a particular employee? These are just a few of the many questions left unanswered by the proposed rule. The proposed rule is too ambiguous and broad in scope to satisfy the requirements for an exemption to the ADEA or even to make meaningful public comment possible. It should be withdrawn.

C. The EEOC Cannot Elevate A Preference for Expeditious and Voluntary Settlement Above the Specific Statutory Policy Requiring EEOC Participation in the Conciliation Process

As a general premise for the proposed rule, the EEOC notes that Title VII and the ADEA share a common purpose--the elimination of employment discrimination--and that similar provisions should be similarly interpreted. The Agency then points to the preference for voluntary settlement of disputes under Title VII and to the conciliation provisions of the ADEA (29 U.S.C. Sections 626(b) and (d)) as evidence of a similar preference for voluntary settlement. Although the Agency argues that permitting unsupervised waivers (such as those permitted by Title VII) would facilitate this ADEA goal of voluntary settlements, this entire analysis is faulty.

First, although the general purpose of eradicating discrimination is shared by both Title VII and the ADEA, the means for accomplishing that purpose are not similar. As discussed above at pp. 4-7 , the statutes do not contain similar enforcement procedures nor similar provisions on waiver which could be subject to similar interpretation. The EEOC itself has recognized the different enforcement procedures in these two statutes in an amicus curie brief it has filed in federal court, 10/ but refuses to acknowledge this elemental distinction in this instance.

Second, the Agency oversteps the bounds of its authority when it elevates a general preference for voluntary settlement above its specific statutory obligation to supervise the conciliation process and the policies tht underly that obligation. As noted above, in recognition of the inherently unequal bargaining position of older workers in disputes with employers, Congress imposed upon the EEOC the obligation of protecting employees through its mandatory role in the conciliation process. Not only may the Agency not disregard this obligation, but in this case is also unable to justify such refusal on the grounds of reconciling two allegedly conflicting sections of the statute.

The EEOC suggests that the ADEA policy promoting voluntary settlement expressed in section 7(d) (20 U.S.C. 626(d)) is at odds with the prohibition against unsupervised waivers, thereby necessitating an "exemption." Section 7(d) contains language similar to Section 7(b), which requires the EEOC to use "informal methods of conciliation, conference and persuasion" to effect compliance and to eliminate any alleged unlawful practice. Neither of these sections contemplate or express a preference for negotiation or settlement without agency participation. To the contrary, the language of both provisions assumes that the EEOC will direct and control the compliance and conciliation processes. See Sedlacek v. Hack, 752 F.2d 333 (8th Cir. 1985). Nor can the Agency find any support in these sections for its tentative conclusion that voluntary and expeditious settlement should be achieved at the expense of the rights of victims of age discrimination. The legislative history of these sections instead emphasizes the primary and protective role envisioned for the enforcing agency in settlements: Congress repeatedly emphasized that Section 7 directs the Secretary (now EEOC) to engage in "efforts initially and exhaustively directed through informal methods of conciliation, conference and persuasion." 11/

The EEOC's argument that "the policy that requires government supervision of releases and waivers is at odds with one that encourages expeditious resolution of disputes," apparently assumes delay inherent from EEOC's supervision. It is unlikely that this is the case or that any such increased delay is significant. Since all ADEA claims must begin as administrative complaints, the EEOC will already be involved in the charge processing and, more importantly, must attempt conciliation pursuant to its obligations under sections 7(b) or (d) of the Act. Any delay caused by EEOC participation in a conciliation agreement has been envisioned and sanctioned by Congress as necessary to protect the complainant. Furthermore, Congress reconciled its concerns about administrative delays by designing certain provisions of the ADEA that accelerate the administrative process. See 29 U.S.C. Section 626(d); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 757 (1979) (quoting remarks of Senator Javits). The EEOC's efforts at conciliation need not be "exhaustive." See EEOC v. Prudential Federal Savings and Loan, 763 F.2d 1166 (10th Cir. 1985). The policies favoring speedy resolution and requiring EEOC supervision clearly do not conflict. 12/

Finally, the EEOC mistakenly assumes that the statutory prohibition against unsupervised waivers discourages employers from engaging in settlement negotiations. No support is offered for this assumption and, in fact, Congress believed the opposite to be the case. The prohibition against unsupervised waivers "was intended to create an incentive for employers to voluntarily accept settlements supervised by the enforcement agency ."

Lynn's Food Stores, Inc. v. United States, 679 F.2d at 1353, citing Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537, 539 (5th Cir. 1977). Supervised settlements should indeed be more attractive to employers. They are less likely to result in litigation and even if challenged, are more likely to be upheld.

Congress has specifically expressed its preference for EEOC protection of the claimants' rights over any marginal procedural efficiency that may result from permitting unsupervised waivers. The Agency may not attempt to use its administrative authority to reverse that decision.

D. The EEOC's Active Involvement in the Execution of ADEA Waivers and Releases is Critical to Protect Older Workers

The proposed rule ignores several basic facts concerning older workers, as well as the harsh realities they confront when they are victims of age discrimination. Older workers, who are generally unaware of their rights under the ADEA, are less likely to pursue legal action, rarely have the resources to pursue an action upon discharge and therefore are particularly vulnerable to inequities in any negotiation process with an employer. See cases cited at pp. 4-6 supra. Congress specifically recognized this vulnerability by incorporating FLSA enforcement procedures that obligate the agency to supervise the conciliation process.

The EEOC's reliance upon Runyan as the motivating factor for the proposed rule ignores the most common characteristics of older workers that prompted Congress to prohibit unsupervised waivers, and generally increase procedural protections for those workers, in the first instance. Unlike Runyan, who was a skilled labor attorney, older workers are rarely knowledgeable about the ADEA, or their employment rights generally. A 1981 Louis Harris Survey conducted for the National Council on the Aging indicated that more than 50% of all workers in the protected class (i.e., 40-70) were unaware of the protections afforded by the ADEA. That statistic, standing alone, indicates that more than half of all older workers could never execute a knowing and voluntary waiver and undermines the EEOC's declaration that a "blanket prohibition against [unsupervised] waivers frustrates the interests of . . . employees . . . ." To the contrary, more than 50% of all protected employees must rely on that "blanket prohibition" as their exclusive means of protection.

Second, the EEOC's proposed rule overlooks the fundamental and practical difficulties encountered by age discrimination victims who are discharged from employment. EEOC charge receipt statistics indicate that discharge, termination or involuntary layoff is the most prevalent form of ADEA complaint; such persons are also those for whom reemployment is most difficult nationwide. Annual statistics published by the Department of Labor's Bureau of Labor Statistics indicate that almost half of all older workers have no private pension coverage. In contrast to the Runyan plaintiff, the average annual salary of older workers protected by the ADEA is near $15,000. 13/ Cumulatively, these generic characteristics (low salary, no pension, inability to find employment) render ADEA victims particularly susceptible to accepting modest termination bonuses or other minimal monetary inducements in exchange for waiving far more valuable ADEA claims. They are particularly vulnerable to attempts by employers to (illegally) condition the receipt of earned employee benefits, *i.e.*, vested pension benefits, upon the waiver of ADEA rights. 14/ It is this overwhelming class of age discrimination victims that Congress had in mind when it incorporated the non-waiver provisions of the FLSA into the ADEA.

The proposed rule will also result in litigation over the issue of whether a waiver was voluntary or knowing, which would have to be determined prior to any hearing on relief. Its effect would be to create an additional and costly legal obstacle for complainants seeking relief. Courts have been inclined to reject any procedural requirement that imposes additional legal hurdles for complainants pursuing their rights under the ADEA. 15/ And, as discussed above, it is unlikely that employers would welcome the possibility of increased litigation.

Another burdensome consequence of the proposed rule would be to make it more difficult for age discrimination complainants to hire competent counsel. Litigation under the ADEA is often complex and expensive. AARP members frequently seek assistance in locating attorneys to handle their age discimination claims and are often confronted with a paucity of competent and willing counsel. The prospect of litigating the waiver issue may make age discrimination cases even more unpalatable for attorneys and thus make it more difficult for complainants to retain counsel. The likely probability of litigation arising from the waiver issue would also prompt attorneys to seek larger retainers from ADEA complainants, many of whom are financially hard-pressed to litigate even the merits of their claims.

CONCLUSION

The proposed rule to permit unsupervised waivers is contrary to the language, policies and spirit of the ADEA. This misuse of the EEOC's authority to grant exemptions from the ADEA is, in reality, an impermissible revision of the specific and exclusive enforcement mechanism created by Congress in the statute. Those persons intended to benefit from the special protection of the EEOC are those who will be most harmed by the proposed rule. For the reasons discussed above, the American Association of Retired Persons objects to the proposed rule and urges the EEOC to withdraw it from consideration.

RESPECTFULLY SUBMITTED,

American Association of Retired Persons

By:
Sana F. Shtasel, Director
J. Scott Marshall
Michele Pollak
Federal Affairs

December 6, 1985
(corrected,
December 13, 1985)

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FOOTNOTES

1/ Legislative History of the Age Discrimination in Employment Act 64-89 (1981)

2/ Section 16(c) of the FLSA, 29 U.S.C. sec. 216(c), states:

> The Secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to any employee or employees under Section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under Subsection (b) of this Section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

3/ Section 7(b) of the ADEA, 29 U.S.C. sec. 626(b), states:

> The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in Sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended . . .

4/ See also Pfeiffer v. Wrigley Co., 755 F.2d 554 (7th Cir. 1985) (discussing recent attempts to give extra-territorial application to Title VII, which had been based on statutory language with no counterpart in the ADEA; the court found no basis for using Title VII as guidance); Kennedy v. Whitehurst, 690 F.2d 951, 963-65 (D.C. Cir. 1982) (comparing federal employees' procedural rights under Title VII and the ADEA); Merkel v. Scovill, Inc., 570 F.Supp. 141 (S.D. Ohio 1983). See also La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286,288 (5th Cir. 1975) (certification of class actions under the ADEA follows FLSA model, not F.R.Civ.P.23 used in Title VII class actions). Accord Lusardi v. Xerox Corp., 99 F.R.D. 89, 92 (D.N.J. 1983).

5/ In contrast to its incorporation of Section 16, the ADEA does not incorporate section 253 of the FLSA, which promotes private settlements in limited circumstances.

6/ Accord Burns v. Equitable Life Assurance Society, 696 F.2d 21, 23 (2d Cir. 1982).

7/ The failure of the proposed rule to clarify the scope, application and duration of unsupervised waivers executed pursuant to this "exemption" poses special problems for ADEA complainants. See discussion at pp. 13-15, infra.

8/ In this case, the Agency improperly invokes its exemption authority to resolve what it perceives to be conflicting statutory policies. See discussion at pp. 11-12, infra.

Examples of appropriately circumscribed exemptions include the exemption of bona fide executives from coverage of the ADEA pursuant to sec. 12(c)(1) of the Act and the now-expired exemption for tenured faculty members under sec. 12(d). The regulations interpreting the ADEA also contain an apparent exemption for apprenticeship programs. 29 C.F.R. sec. 625.13. These exemptions apply to specific types of individuals or categories of employment. The proposed rule contains no such limitations.

See amicus curiae brief of the EEOC in Kelly v. Wauconda Park District, No. 85-2390 (7th Cir., brief filed Oct. 28, 1985) (arguing a difference in coverage of the ADEA and Title VII for state and local government employers).

H.R. Rep. No. 805, 90th Cong., 1st Sess., p. 5, reprinted in 1967 U.S. Code Cong. & Ad. News 2213, 2218; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., p. 12, reprinted in 1978 U.S. Code Cong. & Ad. News 504, 534; 124 Cong. Rec. 7880, 7882 (1978) (remarks of Rep. Quie).

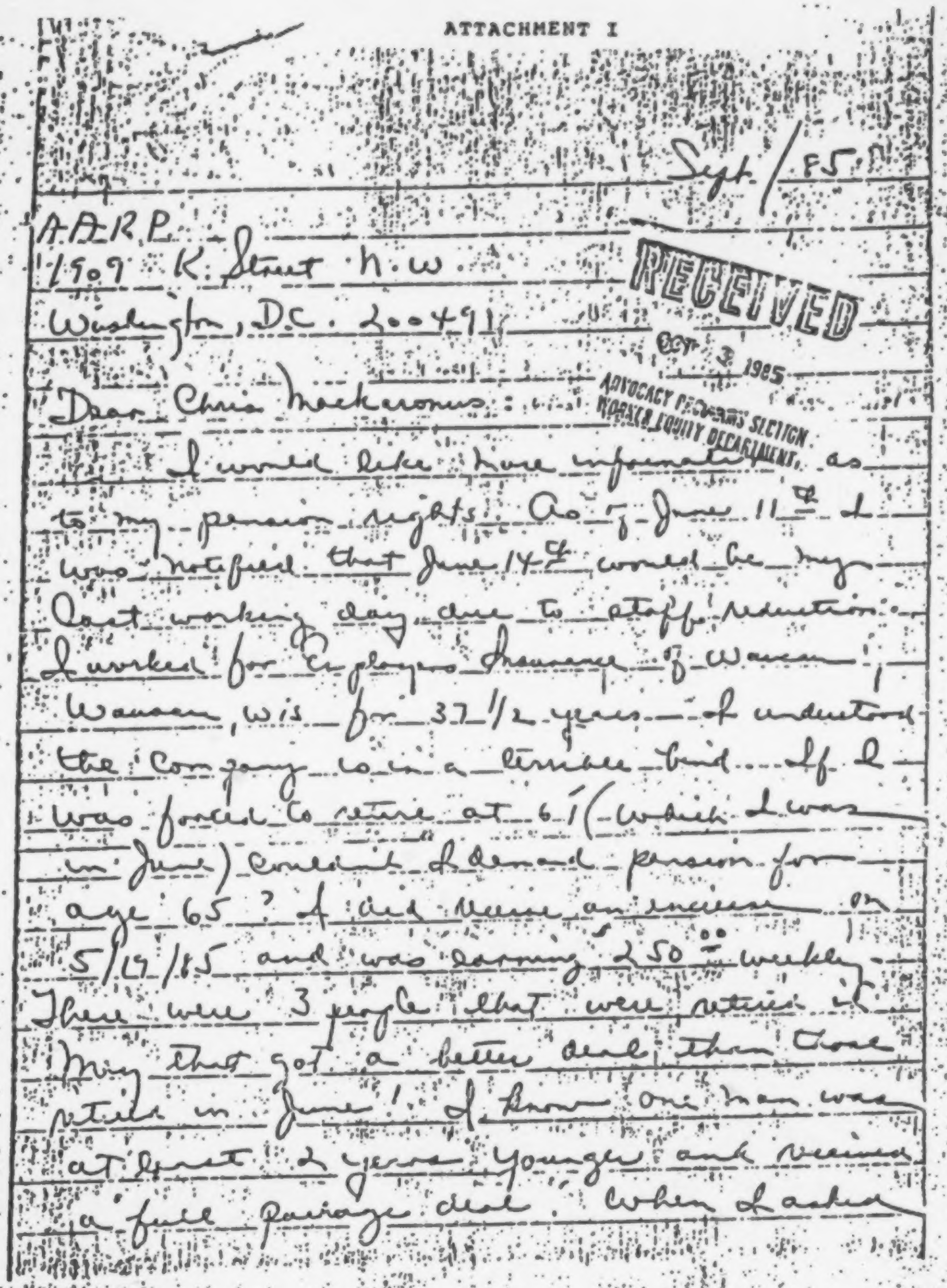
The EEOC also points to Section 2(b) of the ADEA, 29 U.S.C. sec. 621(b), as evidence of a preference for voluntary settlement. Section 2(b) states that one of the purposes of the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age and employment." This general purpose provision certainly cannot override the specific procedural protections given to workers under other sections of the Act. Furthermore, sec. 2(b) is directed at the cooperative educational and research programs authorized by sec. 3 of the ADEA.

See Cost of Mandating Pension Accruals for Employees Aged 65-69 (William M. Mercer Meidinger, Inc. 1985).

See Attachment I to these Comments. This letter to AARP from one of its members illustrates a common situation faced by older workers at the point of forced retirement. The older worker was told by her employer that she had to sign a release agreement waiving her ADEA rights or forfeit her pension and severance benefits; the employee was not told that she was lawfully entitled to her pension and severance benefits notwithstanding any ADEA claims she may have. No other consideration was offered for waiver of her ADEA rights. The older worker wrote to AARP seeking advice on her "pension rights" and indicated her lack of knowledge of the protections afforded by the ADEA. The employer had confronted her with forced retirement and the release three days prior to her discharge.

See Curto v. Sears, Roebuck & Co., 552 F.Supp. 891, 900 (N.D. Ill. 1982). Accord Burns v. Equitable Life Assurance Co., 696 F.2d at 24.

ATTACHMENT I



Sept/85

A.A.R.P.
1909 K. Street N.W.
Washington, D.C. 20049

RECEIVED
OCT 3 1985
ADVOCACY PROGRAMS SECTION
WORKER EQUITY DEPARTMENT

Dear Chris Mackaronis:

I would like more information as to my pension rights. As of June 11th I was notified that June 14th would be my last working day due to staff reduction. I worked for Employers Insurance of Wausau, Wausau, Wis for 37 1/2 years. I understand the Company is in a terrible bind. If I was forced to retire at 61 (which I was in June) couldn't I demand pension for age 65? I did receive an increase on 5/19/85 and was earning 250.00 weekly. There were 3 people that were retired in May that got a better deal than those retired in June! I know one man was at least 2 years younger and received a "full package deal". When I asked

Why did I get a deal like this — I was told the Company contributed toward them but in June there was no money left for us! There were 180 home office employees that were terminated in June due to staff reduction — at least 30% or more were older employees!

I'm getting a pension of 528.61 a month, which is the highest amount I can get for the option I selected. I'm getting this for the rest of my life but if I die there are no survivor benefits. In addition I'm getting a supplementary benefit of $216.67 a month for 2 years. In order to get this I had to sign an agreement, otherwise I was out the money. I have enclosed copies of my agreement that I signed and the calculation sheet. What is your opinion of this situation?

Sincerely,

AGREEMENT

Agreement by and between , hereinafter "Employee," and EMPLOYERS INSURANCE OF WAUSAU A Mutual Company, hereinafter "Company."

WITNESSETH:

WHEREAS, the Employee's employment with the Company is being terminated as part of a "required reduction in staff;" and

WHEREAS, the Employee is eligible for early retirement under the Pension Plan of Wausau Insurance Companies and has a minimum of twenty-five full years of employment with the Company; and

WHEREAS, the Employee and the Company desire to enter into an arrangement to provide dismissal pay;.

THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Employee shall retire from employment with the Company effective June 30, 1985. The Employee's last working day shall be June 14, 1985.

2. The Company agrees to pay to the Employee a payment of $216.67 per month (subject to withholding and deductions) for twenty-four months, commencing on July 1, 1985. Such monthly payments shall cease on June 1, 1987 (last payment date).

   In the event of the Employee's death, remaining monthly payments, if any, shall be paid to the Employee's estate.

3. Payment for unused vacation days and personal holidays for 1985 will be made to Employee in addition to the amount stipulated in paragaraph 2 above.

4. In consideration for the monthly payments hereunder, the Employee agrees upon execution of this Agreement to remise, release and discharge the Company from any and all action, actions, causes and causes of action, suits, debts, sums of money and any other claims in law or in equity against the Company that the Employee ever had, now has or hereafter shall have for or by reason of any matter, cause or thing whatsoever arising out of or by virtue of the Employee's employment or retirement from employment with the Company.

5. Employee acknowledges and agrees that the above release is hereby incorporated into this paragraph 5 by reference and shall fully apply to all rights (including any rights to attorney's fees and costs) to proceed against the Company under any federal, state or local discrimination law. Employee gives said release voluntarily with knowledge of all Employee's rights under such laws. Employee further agrees to neither cooperate nor participate in any proceeding by a federal, state or local governmental agency against the Company arising out of the Employee's employment or retirement from employment with the Company.

6. Payments to be received by Employee hereunder are in addition to and not in lieu of any benefits to which Employee may be entitled under any employee benefit plan sponsored by the Company, including but not limited to the Pension Plan of Wausau Insurance Companies; PROVIDED that, payments under paragraph 2 above are in lieu of any amount payable under the Company's "dismissal pay policy" or "reduction in staff dismissal pay policy" and Employee hereby waives any right to any payments under such policies or plans.

7. The Employee shall not have the power to transfer, assign, anticipate, mortgage or otherwise encumber in advance any payments hereunder, nor shall such payments be subject to seizure for the payment of public or private debts, judgments, alimony or separate maintenance, or be transferable by operation of law in the event of bankruptcy, insolvency or otherwise.

8. The invalidity or unenforceability of any provision of this Agreement shall in no way affect the validity or enforceability of any other provision.

9. This Agreement constitutes the entire agreement between the parties, and each party understands that there are no other oral understandings or agreements other than those set out herein.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

EMPLOYERS INSURANCE OF WAUSAU A Mutual Company, "Company"

B: ______________________________ 7/1/85
(Date)

Senior Vice President, Administrative Services

______________________________, "Employee" 6/28/85
(Date)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED
1987 JUL 28 AM 10 50
OFFICE OF THE CHAIRMAN

JUL 28 1987

PURPOSE: Action

Action Requested by:
Elizabeth M. Thornton
Associate Legal Counsel
Coordination and Guidance Services

MEMORANDUM

TO : Cynthia C. Matthews
Executive Officer
Executive Secretariat

FROM : Elizabeth M. Thornton
Associate Legal Counsel
Coordination and Guidance Services

SUBJECT : Proposed Final Rule package on unsupervised waivers under the ADEA

We are requesting that the above-referenced package be circulated to the Commissioners at the earliest possible time. The Commission is scheduled to consider this matter at the July 30th meeting.

We have attached a very recent decision by the United States Court of Appeals for the Fifth Judicial Circuit on the waivers issue. Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (July 16, 1987). This holding has been incorporated into the proposed Preamble and Final Rule.

For further information, please contact Elizabeth M. Thornton, Associate Legal Counsel, on 634-7643.

Attachments

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL 28 1987

MEMORANDUM

PURPOSE: Action

TO : Clarence Thomas
Chairman

R. Gaull Silberman
Vice Chairman

Tony E. Gallegos
Commissioner

Evan J. Kemp, Jr.
Commissioner

FROM : Richard D. Komer Richard D. Komer
Legal Counsel

SUBJECT : Discussion of issues with respect to the Commission's Notice of Proposed Rulemaking for an exemption allowing for unsupervised waivers under the ADEA

Introduction

This memorandum presents a discussion of issues with respect to the Commission's Notice of Proposed Rulemaking (NPRM) for an exemption allowing unsupervised waivers under the ADEA. The issues were developed largely from the comments received during the 60-day comment period following publication of the NPRM in the Federal Register on October 7, 1985 (50 F.R. 40870). A summary and review of the comments was prepared by this Office and distributed to the Commission on February 10, 1986.

Attached to this memorandum is a draft Preamble and Final Rule incorporating our recommended changes. 1/ The proposed Final Rule states that a release of prospective rights or claims will not be permitted and that consideration in exchange for a waiver or release cannot include benefits to which the employee is already entitled. In addition, the Final Rule now includes a list of relevant factors that the courts have identified when analyzing whether or not a waiver was executed in a knowing and voluntary manner and also provides that a waiver may not be used to justify interfering with an employee's protected right to file a charge (see Cosmair below). The en banc decision by the Sixth Circuit in Runyan v. National Cash Register Corp., 787 F.2d 1039 (1986), cert. denied, 55 U.S.L.W. 3234 (No. 86-95, Oct. 6, 1986) is also incorporated in the Preamble discussion. Runyan holds that unsupervised waivers of ADEA claims in cases involving bona fide factual disputes are permissible. Accord Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987) (discussed at Issue 7, infra); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).

Issue 1

Whether to add specific language stating that waivers of prospective ADEA rights are invalid

A number of commenters questioned whether the NPRM's waiver exemption might be interpreted as permitting prospective application (waiver of rights or claims for acts occurring after the time the waiver or release is executed). Some suggested that a specific prohibition against recognizing a waiver of future claims should be added to the proposed rule.

A specific statement or provision prohibiting waiver of future claims was not included in the NPRM because Title VII case law concerning waivers of statutory rights, referred to in the NPRM as applicable to ADEA waivers, precludes such waivers. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); see also United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 856 (5th Cir., 1975), cert. denied, 425 U.S. 944 (1976). Despite the clear judicial pronouncements on the impermissibility of prospective waivers under Title VII and the fact that the NPRM specifically referred to the applicability of Title VII precedent, considerable concern about prospective application of the proposed regulation has been evidenced.

Recommendation

We strongly recommend that specific language prohibiting waiver of future claims be added to the Preamble and the Final Rule. The leading cases under Title VII concerning waivers, cited above, preclude waivers of future rights or claims. By clearly stating that this principle is an integral part of the Commission's ADEA waiver position, we can put an end to public concern on this issue.

Issue 2

Whether to add specific standards or criteria to the rule for determining when a waiver is "knowing and voluntary"

There were numerous comments in response to the specific request in the NPRM for discussion of whether it is necessary to develop and publish in our rule particular standards to determine if ADEA waivers are "knowing and voluntary." Several commenters expressed opposition to the wisdom or need for such standards, while others believed that some criteria were necessary.

1/ The subject of unsupervised waivers under the ADEA was discussed at a meeting of the Special Assistants on April 29, 1987. A number of suggestions offered at that time have been incorporated in the proposed Preamble and Final Rule.

The most common rationale given in opposition to specific standards was that the knowing and voluntary nature of a waiver is best determined by the courts on a case-by-case basis as is done under Title VII. Commenters also expressed the belief that formulating such standards in the absence of specific facts would be difficult and inevitably would involve the Commission in supervising waivers.

The commenters favoring the development of standards for knowing and voluntary waivers generally thought that such criteria would be helpful in assuring that persons would be given full explanations of their rights and options before waivers are sought and, thus, later controversy could be avoided. Some specific standards that were suggested included:

(1) Requiring that the agreement be in writing, in understandable language, and clearly waive the employee's rights or claims under the ADEA;

(2) Providing a reasonable minimum period prior to execution to allow an employee to analyze the waiver agreement;

(3) Requiring that the waiver be written in "plain English;"

(4) Requiring advice to an employee that he consult an attorney;

(5) Providing language that would put the employee on notice that entering into the agreement may well foreclose his or her rights under the ADEA.

Recommendation

We recommend against establishing particular standards as absolute requisites to any determination that an unsupervised ADEA waiver is "knowing and voluntary." Title VII case law on waivers has generally considered some or all of the criteria cited above but on a case-by-case basis. Flexibility to assess waivers within the context of a given factual setting is critical. Requiring that every waiver contain specific provisions to be "knowing and voluntary" would tend to place form over substance in the context of the particular factual circumstances that arise. The standards of review developed and set out in Title VII case law (cited in the NPRM as applicable to ADEA waivers, see p. 2 of the preamble) make such formal criteria generally unnecessary. We do recommend, however, describing in the Final Rule certain relevant factors along the lines of the suggested standards or criteria cited above that will be considered by the Commission in evaluating waivers that come before it. The proposed Preamble and Final Rule note that the indicators are presented as examples only. Other factors not listed may be important in evaluating "knowing and voluntary" and not all of the enumerated indicators need be present for a waiver to be valid.

Issue 3

Whether to add language in the rule to require that "knowing and voluntary" waivers under the ADEA can involve only contractual agreements that are intended to resolve actual asserted or "known" claims of age discrimination

This asserted or "known" claims criterion for "knowing and voluntary" waivers (either by the filing of an ADEA charge or by an assertion of age discrimination made by employee to employer) would require the giving of actual notice in the waiver of the claims or rights being waived in addition to the requirement that waivers be negotiated without fraud or duress. The concept of an asserted or "known" claim arises from the factual circumstances of most Title VII case law [again, Title VII case law regarding waivers is cited as applicable precedent in the NPRM] where waivers or releases generally have been judicially reviewed only in instances where a legal claim had been specifically asserted, usually by means of a charge having been filed. See Title VII cases cited in NPRM: Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E. - D.C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975). However, the court decisions generally have not discussed the issue of whether an asserted claim is required for a valid unsupervised waiver under Title VII.

The argument against requiring an actual asserted or "known" claim or pre-existing dispute for a waiver to be valid is that employees should be presumed to be aware of their rights under the ADEA. A knowing waiver of these rights should be recognized at any time whether or not the employee involved believes that his ADEA rights have been violated. To require an asserted or "known" claim or dispute as a condition for a waiver would invalidate the majority of waivers, in which employees do not believe ADEA violations have occurred, and legitimize only the much smaller number of waivers that are entered into by employees who have previously indicated that they suspect illegal age discrimination. Such a requirement, it is argued, would inhibit the expeditious resolution of potential ADEA claims and discourage the granting of enhanced benefits in exchange for waivers.

Recommendation

In the NPRM the public is directed to Title VII case law on waivers for guidance as to knowing and voluntary standards (Preamble at p. 6). Under that case law, the issue as to the necessity of an asserted claim generally is not discussed because the waiver or settlement has been entered into after a charge is filed. There is some ADEA case law that appears to require an asserted conflict or dispute before rights may be waived or a claim settled. *See EEOC v. United States Steel Corp.*, 583 F.Supp. 1357 (W.D. Pa. 1984); *Runyan v. National Cash Register Corp.*, 573 F.Supp. 1454 (S.D. Ohio 1983), *aff'd*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3234 (No. 86-95, Oct. 6, 1986). We believe, however, that requiring an asserted claim would not be productive. The basic requirement of "knowledge" or "knowingness" regarding an employee's rights under the ADEA can be assessed without requiring that a claim has been actually presented to the employer or the EEOC. Because of the limitless number of factual settings that could arise, a case-by-case evaluation of employees' "knowledge" of their rights (using criteria discussed earlier under Issue 2) appears to be the soundest approach to this issue.

Issue 4

Whether to add language to the rule defining valid consideration and stating that waivers cannot be in exchange for employment benefits to which the employee is already entitled

Generally, case law on waivers, including Title VII case law, has evaluated the adequacy of consideration not on the basis of whether a party received as much as he might have had the dispute been litigated and won, but rather whether he received something of value to which he was not already unquestionably entitled. The argument against any attempt at requiring or discussing "valid consideration" for ADEA waivers is that the rule or exemption would need to define the term with sufficient precision to cover a vast array of factual circumstances. Many commenters believe this is a concept that is best left to the courts to raise and define on a case-by-case basis as has been done under Title VII.

Recommendation

We recommend that the rule have language added to specify that consideration in exchange for a waiver under the ADEA cannot include employment benefits to which the employee is already entitled. This language would merely create a floor or bottom line concept generally recognized by courts in waiver or settlement cases, *see*, *e.g.*, *Runyan v. NCR Corporation*, 573 F. Supp. 1454 (S.D. Ohio, 1983), as to what constitutes adequate or valid consideration. We recommend against, however, attempting to further define "valid consideration" in the rule because of the need to make such a determination of validity on a case-by-case basis.

Issue 5

Whether to remove or revise the last sentence of the NPRM, which states that:

> No such waivers or releases, however,
> shall affect the Commission's rights and
> responsibilities to enforce the Act.

Several commenters expressed a preference that this sentence be removed or that other language be substituted. One specific suggestion was to amend it in order to make clear that the Commission will not seek relief for individuals who have knowingly and voluntarily executed releases and waivers of their ADEA rights. The amended language also could make clear that the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or when a waiver is raised in an investigative context.

Leaving the present NPRM language as it is emphasizes that the Commission is both ready to look into whether waivers are knowing and voluntary (or executed under duress or fraud) and to enforce the Act whenever the Commission believes there is a public interest in doing so. For example, where a company policy comes to the Commission's attention by way of contact from an employee who has signed a waiver and that policy appears to be a clear violation of the ADEA, the Commission will not be estopped from pursuing the enforcement of the ADEA on behalf of other employees regardless of the individual's status after the waiver agreement. *See Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (July 16, 1987) (discussed at Issue 7, *infra*).

Recommendation

We recommend that the present language in the last sentence of the NPRM be left intact. As presently worded the provision reserves maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA.

Issue 6

Whether to delete or modify the paragraph in the NPRM preamble (in light of the Sixth Circuit's en banc decision in Runyan), stating that under Fair Labor Standards Act procedures and case law unsupervised waivers may be precluded

The NPRM states that FLSA case law precludes unsupervised waivers and the application of these enforcement procedures to the ADEA could preclude unsupervised age waivers. Since publication of the NPRM, however, the Runyan en banc decision has recognized the permissibility of certain unsupervised waivers (whenever there are bona fide disputes over factual issues) under the FLSA and the ADEA.

The underlying liability question in the Runyan case, like most other ADEA cases, involved a factual dispute over the employer's motive or intent and not a legal issue. In addition, the complainant in Runyan was a labor law attorney, and he was not alleging any duress or overreaching on the part of the employer in obtaining the agreement. The en banc decision (787 F.2d at 1043) distinguished between the ADEA and the FLSA on the basis of congressional intent as to the categories of employees to be protected (FLSA secures "the lowest paid segment . . . . a subsistence wage" while ADEA deals with "different segment of employees, many of whom were highly paid and capable of securing legal assistance without difficulty.")

Even while emphasizing Runyan en banc in the Preamble, the Commission might note that one appellate court views FLSA precedents that are discussed in the Preamble at pp. 4-5, as completely rejecting unsupervised FLSA waivers. See Lynn's Food Stores, Inc. v. United States Dept. of Labor, 679 F.2d 1350, 1354-55 (11th Cir. 1982). Thus, the need for a rule or an administrative exemption permitting unsupervised ADEA waivers in this circuit would likely remain as previously discussed in the NPRM.

Recommendation

We recommend that the Preamble paragraph discussing section 7(b) of the ADEA and FLSA case law limitations on waivers be modified in light of the Runyan en banc decision (as has been done in the current proposal). That important decision clearly recognizes unsupervised waivers under the FLSA and ADEA involving resolutions of factual disputes and thus clarifies and distinguishes these types of waivers left uncertain in the O'Neill and Gangi FLSA cases cited in the Preamble to the NPRM. The en banc decision goes a long way toward resolving the uncertainty as to unsupervised ADEA waivers articulated in the Preamble to the NPRM. Accord Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986). This fact is clearly emphasized in the current proposal (Preamble, p. 5).

In addition we are recommending and have included language emphasizing that to the extent that any arguable conflict with Runyan en banc can be found in other circuits, i.e., Lynn's Food Stores, the Commission's exemption authority is being used to permit unsupervised waivers involving factual disputes under the ADEA in those jurisdictions. Similarly the Commission's exemption authority under section 9 of the ADEA is being exercised to permit such unsupervised waivers where Runyan en banc leaves uncertainty, i.e., situations where an asserted claim under the ADEA has not been made either to the EEOC or to the employer but the waiver is found to be knowing on the basis of all the circumstances involved (Preamble, p.6).

Issue 7

Whether to add language stating that it is unlawful retaliation under section 4(d) of the ADEA for an employer to take any adverse action against a former employee because that employee filed a charge with the EEOC or otherwise participated in an investigation

In a very recent decision, the United States Court of Appeals for the Fifth Judicial Circuit joined the Sixth and Eighth Circuits in specifically upholding "knowing and voluntary" unsupervised waivers under the ADEA. Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806, slip. op. at 5147 (July 16, 1987). While upholding the use of unsupervised waivers under the ADEA, the court also drew distinct boundaries for such waivers:

> Cosmair represented . . . that the parties intended that the release waive [the employee's] right to file a charge . . . . [W]e hold . . . that a waiver of the right to file a charge is void as against public policy . . . .
>
> Since [the employee] could not waive his right to file a charge, he did not breach the release when he filed a charge . . . . Cosmair terminated [the employee's] severance payments [consideration for the waiver] solely because he filed a charge. Since Cosmair had no legal excuse for suspending payments, this constitutes retaliation [under sec. 4(d) of the ADEA] . . . .

Cosmair, slip op. at 5145.

The Commission may wish to incorporate the above quoted principles from Cosmair into the Preamble and Final Rule.

Recommendation

We recommend that this position be specified in the Preamble and the Final Rule so that the Commission's regulatory position is consistent with its litigation position (accepted by the Fifth Circuit) articulating the essential nature of the charge and investigatory process to the enforcement of the ADEA (Preamble, p.6). Without such a prohibition against retaliation for filing a charge or cooperating in an investigation, releases would be largely immune from a Commission determination as to whether they were executed in a knowing and voluntary manner. Further, Commission investigations would be thwarted with regard to whether there is a policy or practice of discrimination affecting other employees. Employers should be provided with clear notice that waivers, if knowing and voluntary, can bar ultimate recovery on the merits of a claim but can never bar a person's right to present the waiver to the Commission for its scrutiny.

Issue 8

Issue a second NPRM before promulgating a final rule or exemption

While not required by law to publish a second NPRM, the Commission may wish to consider taking such action to insure the fullest possible participation in the regulatory process. Such action would be particularly useful where, as here, the issue is of considerable import under the ADEA, an interpretation has never existed on the subject, and the exemption/rulemaking process of the ADEA has not been used previously by the EEOC. Also, where substantial modifications are made in a proposed final rule, a second NPRM is advisable in order to assure full public comment and participation and to avoid later challenge by interested parties that the Commission ignored the "public interest" by not fairly foreshadowing the final rule in its NPRM. This procedure would, of course, be more time consuming than issuing a final regulation that explains what changes are being made from the NPRM and why they are being made.

Recommendation

While it cannot presently be known if significant substantive changes will be made to the NPRM in fashioning a proposed final rule, the Office of Legal Counsel does not believe it will be necessary to publish a second NPRM based on the changes that we can anticipate at this time. (Revisions made after the Special Assistants' meeting have not changed our view.) If, however, substantial modifications are made in the proposed rule, a second NPRM would be advisable for the reasons specified above and in order to come within the general policy recommendations of the Administrative Conference of the United States for insuring maximum public participation in the regulatory process.

PREPARED BY: Coordination & Guidance Services: John Light:JCleary:EThornton:
MH:7/8/87

FOR FURTHER INFORMATION, PLEASE CONTACT: Joseph N. Cleary, OLC, ADEA Division

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Legislative regulation and administrative exemption allowing for non-EEOC supervised waivers under the ADEA

Agency: **Equal Employment Opportunity Commission**

Action: **Notice of Final Rule**

Summary: **The Commission hereby provides notice of a legislative regulation and administrative exemption (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. § 1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.**

Effective Date: **(Insert date 30 days after publication in the Federal Register.)**

For Further Information Contact: **John K. Light at (202) 634-7643.**

Supplementary Information: Section 9 of the ADEA, 29 U.S.C. § 628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission hereby promulgates a legislative regulation and administrative exemption under Section 9 of the ADEA and 29 C.F.R. § 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. § 621 et seq.

A Notice of Proposed Rulemaking (NPRM) regarding this rule was published in the Federal Register of Monday, October 7, 1985 (50 Fed. Reg. 40870) with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the right to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address whether it is necessary to develop particular standards to determine whether waivers are "knowing and voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the document, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence or absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a waiver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will look to the substance, not to the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> "No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act."

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA. See Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly that release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." Alexander v. Gardner-Denver Co., 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. § 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage eloyers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a paternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not wish to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (see EEOC v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987) ("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 861 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (The O'Neil-Schulte line of cases "were tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (see Brooklyn Savings Bank v. O'Neil, supra). There is no such presumption under Title VII. United States v. Allegheny- Ludlum Industries, Inc., supra; Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purposes of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Tile VII releases.

Recently, the Sixth Circuit Court of Appeals sitting en banc held that an unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. Runyan v. National Cash Register Corp., 787 F.2d 1039, cert. denied, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, O'Neil and Gangi do not preclude an unsupervised waiver or release under FLSA or ADEA. Accord Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's Runyan en banc decision with regard to unsupervised waivers under the ADEA and has incorporated that approach in the final rule. The Commission believes that the reasoning of the Runyan en banc decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the Runyan en banc decision (see Lynn's Food Stores, Inc. v. United States Dept. of Labor, 679 F.2d 1350, 1354-55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under Section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." Either a clear understanding of the nature of the rights being waived or the presence of an asserted claim could satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. See Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. See Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986); Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E. - D. C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S.1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. Alexander v. Gardner-Denver Co., 415 U.S. at 51; United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 856 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). In addition, the Commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. See Runyan v. NCR Corp., 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), aff'd, 787 F.2d 1039 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. Id. The plain language of section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, inter alia, filed a charge. See Id. at 5144. The enforcement policies underlying the ADEA strongly support this position. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806 (5th Cir. July 16, 1987); see Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis — Classification-Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission amends 29 C.F.R. § 1627.16 by adding a new subsection (c) to read as follows:

§ 1627.16 Specific exemptions:

. . . .

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

When assessing the validity of a waiver agreement, the Commission will look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid.

No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this _____ Day of ________________ at Washington, D.C.

For the Commission

____
Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,

v.

COSMAIR, INC., L'OREAL HAIR CARE DIVISION,
Defendant-Appellant.

No. 86-1806.

United States Court of Appeals,
Fifth Circuit.

July 16, 1987.

Former employee sued for preliminary injunction, requiring employer to continue severance pay and medical insurance coverage promised pursuant to release. The United States District Court, Northern District of Texas, Jerry Buchmeyer, J., granted employee's motion for preliminary injunction, and employer appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) term "employee," as used in section of the Age Discrimination in Employment Act prohibiting employer from discriminating against employees, included both present and former employees; (2) language in release signed by former employee, purporting to release employer from "all actions, causes of action, claims and demands whatsoever" did not prohibit employee from filing age discrimination charge with the Equal Employment Opportunity Commission; (3) waiver of right to file charge with the E.E.O.C. is void as against public policy; and (4) issuance of company-wide injunction, to prevent employer from discontinuing severance pay after employees file charge, was not abuse of discretion.

Modified, affirmed and remanded.

1. Injunction 🔑130

Whether party seeking injunction has demonstrated substantial likelihood of success on merits and other elements essential to claim is mixed question of fact and law.

2. Civil Rights 🔑9.15

Term "employee" as used in section of the Age Discrimination in Employment Act prohibiting employers from discriminating against employees, includes both present and former employees as long as alleged discrimination is related to or arises out of employment relationship. Age Discrimination in Employment Act of 1967, §§ 4(d), 11(f), 29 U.S.C.A. §§ 623(d), 630(f).

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights 🔑9.15

Former employee who filed charged with the Equal Employment Opportunity Commission, alleging that employer had discriminated against him while he was employee, continued to be "employee" for purpose of antidiscrimination provisions of the Age Discrimination in Employment Act; accordingly, employer could not discontinue employee's severance pay simply because he had filed charge. Age Discrimination in Employment Act of 1967, §§ 4(d), 11(f), 29 U.S.C.A. §§ 623(d), 630(f).

4. Release 🔑38

Language in release signed by former employee, purporting to release employer from "all actions, causes of action, claims and demands whatsoever," did not prohibit employee from filing age discrimination charge with the Equal Employment Opportunity Commission, particularly where

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charge merely described employer's alleged discrimination and contained no demand for relief.

5. Civil Rights ⟹34

Any waiver by employee of right to file age discrimination charge with the Equal Employment Opportunity Commission is void as against public policy.

6. Injunction ⟹14

When injunction is expressly authorized by statute and statutory conditions are satisfied, movant need not establish a specific irreparable injury to obtain preliminary injunction.

7. Civil Rights ⟹46(17)

"Irreparable injury" was presumed, for purpose of granting preliminary injunction, where employee alleged that former employer had discriminated against him by discontinuing severance pay after employee filed age discrimination charge with the Equal Employment Opportunity Commission. Age Discrimination in Employment Act of 1967, §§ 4(d), 7(b), 29 U.S.C.A. §§ 623(d), 626(b).

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights ⟹46(3)

Issuance of company-wide injunction against employer, who had policy of terminating severance pay to former employees in event that employees filed employment discrimination charge with the Equal Employment Opportunity Commission, was not abuse of discretion, though employee who sought injunction presented evidence of only one concrete incident of discrimination.

9. Civil Rights ⟹39

Private, unsupervised waiver of ADEA cause of action by employee is valid, as long as it is voluntary and knowing. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

10. Civil Rights ⟹39

Even though employee cannot waive right to "file charge" with the Equal Employment Opportunity Commission, employee can waive not only right to recover in his or her own lawsuit, but also right to recover in suit brought by the EEOC on employee's behalf.

11. Civil Rights ⟹39

Fact that waiver of right to file charge with the Equal Employment Opportunity Commission is void as against public policy does not invalidate waiver of cause of action with which it is conjoined.

Appeals from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, POLITZ, and HIGGINBOTHAM, Circuit Judges.

CLARK, Chief Judge:

Cosmair, Inc. appeals the issuance of a preliminary injunction requiring it to continue severance pay and medical insurance coverage promised to an employee in exchange for a release of Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634, and other claims. Cosmair stopped performing its part of the bargain when the employee filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). We modify the injunction in part, and, as modified, affirm.

I. Factual Background

Robert Lee Terry was Central Texas Sales Representative for the L'Oreal Hair Care Division of Cosmair. Kevin Bergin, Director of Human Resources for Cosmair, fired Terry on March 18, 1986. When terminated, Terry was 53 years old and had worked for Cosmair 18 years. Bergin offered to continue Terry's salary and medical benefits for 37 weeks following discharge in exchange for Terry's releasing Cosmair

> from all actions, causes of action, claims and demands whatsoever including, but not limited to, any claims, such as those under any federal, state or local law dealing with discrimination in employment on the basis of sex, race, national origin, religion, or age, arising from or in connection with his employment with COSMAIR, INC. which he ever had, now has or may have from the day of his commencement of employment with COSMAIR, INC. to the date of this release.

Terry signed the release on March 21, 1986, without consulting his attorney, after Bergin increased the pay and medical benefits offered to 39 weeks. If Terry had not signed the release Cosmair would not have offered him any severance benefits.

On April 7, 1986, Terry filed a charge with the EEOC alleging that Cosmair had discriminated against him on the basis of age in terminating his employment. In addition to allegations that he personally had been harrassed and wrongfully terminated, Terry asserted that Cosmair had a policy of discharging older employees or forcing them into early retirement so that it could replace them with younger employees. On its face the charge sought no relief. When Bergin received notice of the charge, he discontinued Terry's severance benefits. Terry then filed a second charge with the EEOC contending that Cosmair had unlawfully retaliated against him for filing a charge by discontinuing his benefits.

After investigating the retaliation charge and unsuccessfully attempting conciliation, the EEOC determined reasonable cause existed to believe that Cosmair had unlawfully retaliated against Terry for filing an age discrimination charge. The Commission then moved for a preliminary injunction barring Cosmair from refusing to pay severance benefits to Terry, from seeking releases from other employees, and from retaliating against other employees who file age discrimination charges or participate in EEOC investigations. The magistrate recommended denying the EEOC's motion. He concluded that in the absence of case authority establishing the illegality of Cosmair's conduct the EEOC had not proven a substantial likelihood of success on the merits. The district court, not accepting the magistrate's recommendation, granted the motion for preliminary injunction. The court held that Cosmair's conduct was retaliation arising out of the employment relationship and thus was unlawful. Cosmair appeals.

II. Requirements for a Preliminary Injunction

[1] To obtain a preliminary injunction, the moving party bears the burden of proving the following:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant out-

> weighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest.

Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 710 (5th Cir.1984). Each of these elements is a mixed question of fact and law. *Apple Barrel Prod., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir.1984). We review the district court's findings of fact under a clearly erroneous standard and its conclusions of law de novo. *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985). The ultimate issue, however, is whether the district court abused its discretion in granting the preliminary injunction. *Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1259 (5th Cir.1987).

On appeal, Cosmair challenges two of the requirements for a preliminary injunction as not being met. It contends that the EEOC did not demonstrate a substantial likelihood of success on the merits and did not prove irreparable injury. In addition, Cosmair contests the scope of the injunction. The company maintains that the district court erred in issuing a company-wide injunction and in enjoining Cosmair from requiring employees to sign releases to receive severance benefits. We will address these contentions in turn.

III. Likelihood of Success on the Merits

The district court found the EEOC likely to succeed on the merits because Cosmair violated the prohibition on retaliation contained in section 4(d) of the ADEA when it halted severance payments in response to Terry's filing a charge. Section 4(d) makes it "unlawful for an employer to discriminate against any of his employees ... because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this [Act]." 29 U.S.C. § 623(d). This provision is derived from a similar one in title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–3(a); *see Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755–56, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979), and its purpose is to protect persons who "resort[ ] to the legal procedures that Congress has established in order to right congressionally recognized wrongs," *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir.1975). Cosmair argues that Terry is not entitled to claim the protection of section 4(d) because Terry was no longer an employee and because Cosmair's actions did not constitute retaliation.

A. Employee Status

[2, 3] The ADEA protects from retaliation "employees or applicants for employment." 29 U.S.C. § 623(d). Employee means "an individual employed by any employer." *Id.* § 630(f). Cosmair contends that because Terry had already been terminated when he signed the release, and so was no longer employed, he was not protected from retaliation. The term "employee," however, is interpreted broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship. *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir.1978) (per curiam); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165–66 (10th Cir. 1977); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir.1977); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir.1972). Certainly the discontinuance of severance pay arose out of Terry's employment rela-

tionship with Cosmair. Terry's first charge with the EEOC alleged that Cosmair had discriminated against him while he was an employee. The release waived all claims "arising from or in connection with" Terry's employment with Cosmair. The company agreed to continue to pay Terry's salary and medical insurance premiums, and calculated the length of time payments would continue based on the length of Terry's tenure with the company. The district court properly concluded that Terry was a protected employee under the ADEA.

B. Retaliation

Cosmair also argues that it did not violate section 4(d) when it stopped Terry's severance pay because it was merely suspending performance of its duties under the release after Terry breached. The EEOC argues that whether Terry breached the release is irrelevant. According to the Commission, Cosmair could not suspend payments in response to Terry's filing a charge; doing so was retaliation. Cosmair can only rely on the release as a defense to Terry's ADEA cause of action. The district court agreed with the EEOC, holding that a release is at most a defense to an ADEA claim and cannot be used to impede EEOC enforcement of the civil rights laws.

We agree with the district court that Cosmair's suspension of payments was unlawful retaliation, but we do not fully adopt the district court's rationale for reaching that result. Clearly if Cosmair stopped providing Terry benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation. *See McDaniel v. Temple Indep. School Dist.*, 770 F.2d 1340, 1346 (5th Cir.1985) (retaliation requires some "adverse employment action"); *cf. Wolf v. J.I. Case Co.*, 617 F.Supp. 858, 867–68 (E.D. Wisc.1985) (denial of necessary employment information); *Grove v. Frostburg Nat'l Bank*, 549 F.Supp. 922, 944–45 (D.Md.1982) (change in company vacation policy). Cosmair maintains that the present case is distinguishable because Terry's breach relieved the company of its obligation to perform. We need not decide whether Cosmair could suspend payments if Terry breached the release, because Terry did not breach the release. The release did not obligate Terry not to file a charge. His filing a charge did not constitute a breach. Cosmair was not relieved of its obligation to perform; therefore, its discontinuing payments was unlawful retaliation.

[4] Through the release, Terry waived "all actions, causes of action, claims and demands whatsoever." Actions, causes of action, claims, and demands all entail the seeking of "one's own" from another. *See* Black's Law Dictionary 49, 280, 313, 516 (rev. 4th ed. 1968). The purpose of a charge, however, is not to seek recovery from the employer but rather to inform the EEOC of possible discrimination. As the Supreme Court stated in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68, 104 S.Ct. 1621, 1631, 80 L.Ed.2d 41 (1984): "[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of the [ADEA] charge, rather, is to place the EEOC on notice that someone ... believes that an employer has violated the [Act]." Indeed, charges can be filed by persons other than the employee who allegedly suffered from the discrimination. *See* 29 C.F.R. § 1626.4 (1986) (EEOC shall "receive information concerning alleged violations of the [ADEA], including charges and complaints, from any source"). Moreover, the charge Terry ac-

tually filed merely described Cosmair's alleged discrimination and contained no demand for relief. No language of the release barred Terry's right to file a charge.

[5] Cosmair represented at oral argument, however, that the parties intended that the release waive Terry's right to file a charge. To the extent we accept this representation, and some testimony at the preliminary injunction hearing and language in Terry's charge supports it, we hold, alternatively, that a waiver of the right to file a charge is void as against public policy. Therefore, any attempt by Terry to waive his right to file a charge is void.

"The relevant principle is well-established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, — U.S. —, 107 S.Ct. 1187, 1192, 94 L.Ed.2d 405 (1987). The interest in enforcement of the release is to encourage private settlement of age discrimination disputes. *See Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1045 (6th Cir.) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 178, 93 L.Ed.2d 114 (1986). But whether upholding a waiver of the right to file a charge furthers that interest is questionable. The public interest in private dispute settlement is outweighed by the public interest in EEOC enforcement of the ADEA.

Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination. *EEOC v. Shell Oil Co.*, 466 U.S. at 69, 104 S.Ct. at 1631; *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir.1969). A charge not only informs the EEOC of discrimination against the employee who files the charge or on whose behalf it is filed, but also may identify other unlawful company actions. For example, in his charge Terry named two co-workers who allegedly had been fired or forced into early retirement because of age discrimination. When the EEOC acts on this information, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone Co. v. EEOC*, 446 U.S. 318, 326, 100 S.Ct. 1698, 1704, 64 L.Ed.2d 319 (1980); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542–43 (9th Cir.1987). We hold that an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest. A waiver of the right to file a charge is void as against public policy.

Since Terry could not waive his right to file a charge, he did not breach the release when he filed a charge. The district court found, and its finding is not clearly erroneous, that Cosmair terminated Terry's severance payments solely because he filed a charge. Since Cosmair had no legal excuse for suspending payments, this constitutes retaliation. Thus, the EEOC established a substantial likelihood that it would succeed on the merits of its claim that Cosmair retaliated against Terry in violation of the ADEA.

IV. Irreparable Injury

Cosmair argues next that the EEOC failed to show irreparable injury. The district court held that irreparable injury is presumed from violations of the civil rights statutes under *United States v. Hayes*

Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). The court also found irreparable injury in the denial of financial and medical benefits to Terry and the short-circuiting of the EEOC's investigation by the fears of potential witnesses who also had signed releases. We need only reach the first ground for the district court's decision to uphold its determination of irreparable injury.

[6, 7] When an injunction is expressly authorized by statute and the statutory conditions are satisfied, the movant need not establish specific irreparable injury to obtain a preliminary injunction. *Murry v. American Standard, Inc.*, 488 F.2d 529, 531 (5th Cir.1973). Instead, when a civil rights statute is violated, "irreparable injury should be presumed from the very fact that the statute has been violated." *Hayes*, 415 F.2d at 1045. Cosmair argues against extending *Hayes*, citing confusion over the scope of the presumption as reflected in *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. Unit B 1981). *Stone*, however, reaffirms the *Hayes* presumption in cases in which administrative remedies have been exhausted. *Id.* at 612. Here, the ADEA authorizes injunctive relief, 29 U.S.C. § 626(b), the statutory conditions have been met, and administrative proceedings on Terry's retaliation claim are completed. The public interest protected by EEOC enforcement of the ADEA justifies extending the *Hayes* presumption to ADEA retaliation cases. The district court properly presumed irreparable injury.

The EEOC established a substantial likelihood of success on the merits and irreparable injury, as well as the other prerequisites for a preliminary injunction. The district court did not abuse its discretion in granting the request for a preliminary injunction.

V. Scope of the Injunction

[8] Cosmair makes two challenges to the scope of the injunction as ordered by the district court. First, it argues that the district court erred in ordering a company-wide injunction against Cosmair barring the company from discontinuing severance pay of other employees who file charges. Cosmair relies on *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733–35 (5th Cir.1977), which holds that one incident of discrimination is not sufficient to support a company-wide injunction. The evidence in the present case, however, revealed a company policy of terminating payments to employees who file charges. Bergin testified that he told all employees that their severance payments would be halted if they filed a charge, and his response to Terry's charge justifies the inference that he would do as he warned. A company-wide injunction was not an abuse of discretion. *Id.* at 734.

[9] Second, Cosmair argues that the district court erred in enjoining it from "requiring employers to sign waivers or releases of claims of employment discrimination against the Defendant in order to receive severance pay or any other benefit of employment." The EEOC requested this relief in its motion for a preliminary injunction, but on appeal conceded that this relief is overbroad to the extent the injunction is not limited to waivers of the right to file a charge. We agree with both parties that waivers of ADEA causes of action are not void as against public policy. The reasoning of *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1041–45 (6th Cir.) (en banc), *cert. denied*, — U.S. —,

107 S.Ct. 178, 93 L.Ed.2d 114 (1986), is applicable to this case. *See also United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 860–61 (5th Cir.1975) (upholding waivers of title VII causes of action), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). A private, unsupervised waiver of an ADEA cause of action by an employee is valid as long as it is voluntary and knowing. *See Allegheny-Ludlum*, 517 F.2d at 861; Notice of Proposed Rulemaking, 50 Fed.Reg. 40870, 40871 (1985) (to be codified at 29 C.F.R. § 1627.16(c) (proposed Sept. 17, 1985). The injunction is overbroad to the extent it applies to more than waivers of the right to file a charge.

[10, 11] Finally, we add two clarifying notes. First, although an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf. *See EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that backpay claim by EEOC on behalf of employee who settled title VII claim is moot); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir.1986) (stating that EEOC dismissed charge of settling employee "based on its conclusion that [the employee], by signing the release, had waived all Title VII claims against General Electric"). Second, the fact that a waiver of the right to file a charge is void does not invalidate a waiver of a cause of action with which it is conjoined. *See* Restatement (Second) of Contracts § 184(1) (court may enforce remainder of agreement unenforceable in part as against public policy when "performance as to which the agreement is unenforceable is not an essential part of the agreed exchange").

The district court's order granting the motion of the EEOC for preliminary injunctive relief should be modified by deleting the language which forbids Cosmair to obtain any waivers from employees other than waivers of the employees' rights to file charges with the EEOC. The district court is directed to issue a modified injunction consistent with this opinion.

MODIFIED, AFFIRMED and REMANDED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FINAL EEOC RULES ON WAIVERS UNDER AGE DISCRIMINATION IN EMPLOYMENT ACT

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Legislative regulation and administrative exemption allowing for non-EEOC supervised waivers under the ADEA

Agency: Equal Employment Opportunity Commission

Action: Notice of Final Rule

Summary: The Commission hereby provides notice of a legislative regulation and administrative exemption (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. §1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

Effective Date: (Insert date 30 days after publication in the Federal Register.)

For Further Information Contact: John K. Light at (202) 634-7643.

Supplementary Information: Section 9 of the ADEA, 29 U.S.C. §628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission hereby promulgates a legislative regulation and administrative exemption under Section 9 of the ADEA and 29 C.F.R. §1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. §621 *et seq.*

A Notice of Proposed Rulemaking (NPRM) regarding this rule was published in the Federal Register of Monday, October 7, 1985 (50 Fed. Reg. 40870) with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec. 7076 (Remarks of Sen. Javits); *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the right to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address whether it is necessary to develop particular standards to determine whether waivers are "knowing and voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the document, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence of absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a waiver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will look to the substance, not the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;
2) A reasonable period of time was provided for employee deliberation;
3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> "No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act."

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA. *See Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly that release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." *Alexander v. Gardner-Denver Co.*, 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. §626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec. 7076 (Remarks of Sen. Javits); *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage employers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a parternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not wish to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (*see EEOC v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987) ("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. §626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.* In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 861 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (the *O'Neil-Schulte* line of cases "were tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (*Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (*see Brooklyn Savings Bank v. O'Neil, supra*). There is no such presumption under Title VII. *United States, v. Allegheny-Ludlum Industries, Inc., supra; Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purposes of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Title VII releases.

Recently, the Sixth Circuit Court of Appeals sitting *en banc* held that an unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, *cert. denied*, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, *O'Neil* and *Gangi* do not preclude an unsupervised waiver or release under FLSA or ADEA. *Accord Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's *Runyan en banc* decision with regard to unsupervised waivers under the ADEA and has incorporated that approach in the final rule. The Commission believes that the reasoning of the *Runyan en banc* decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the *Runyan en banc* decision (*see Lynn's Food Stores, Inc. v. United States Dept. of Labor*, 679 F.2d 1350, 1354-55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under Section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." Either a clear understanding of the nature of the rights being waived or the presence of an asserted claim could satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. *See Oglesby v. Coca-Cola Bottling Co.*, 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. *See Rogers v. General ELectric Co.*, 781 F.2d 452 (5th Cir. 1986); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1981); *EEOC v. T.I.M.E. — D.C. Freight, Inc.*, 659 F.2d 690 (5th Cir. 1981); *Cox v. Allied Chemical Corp.*, 538 F.2d 1094 (5th Cir. 1976), *cert. denied*, 434 U.S. 1051 (1978); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 51; *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 856 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In addition, the commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. *See Runyan v. NCR Corp.*, 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), *aff'd*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a commission investigation. *Equal Employment Opportunity Commission v. Cosmair*, No. 86-1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. *Id.* The plain language of section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, *inter alia*, filed a charge. *See Id.* at 5144. The enforcement policies underlying the ADEA strongly support this position. Equal employment *Opportunity Commission v. Cosmair*, No. 86-1806 (5th Cir. July 16, 1987); *see Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis — Classification — Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. §605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission amends 29 C.F.R. §1627.16 by adding a new subsection (c) to read as follows:

§1627.16 Specific exemptions:

* * *

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commisison's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

When assessing the validity of a waiver agreement, the Commission will look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this Day of at Washington, D.C.

For the Commission

Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

* * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSI
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

AUG 30 1979

MEMORANDUM

TO: Eleanor Holmes Norton
Chair

Daniel E. Leach
Vice Chair

Ethel Bent Walsh
Commissioner

Armando H. Rodriguez
Commissioner

J. Clay Smith, Jr.
Commissioner

FROM: Leroy D. Clark LDC
General Counsel

SUBJECT: ADEA-Accrual of Benefits After
Normal Retirement Age

Shortly before transferral of enforcement of the Age Discrimination in Employment Act to the Commission, the Department of Labor issued an amendment to its Interpretive Bulletin (I.B.) dealing with the application of the ADEA to employee benefit plans. The principal purpose of the amendment to the I.B. was to provide more comprehensive guidance with respect to Section 4(f)(2) of the Act, particularly because of the increase in the maximum age level of those covered by the Act. An important change in the amendment was the provision in Section 860.120(f) that an employer need not provide for an accrual of pension benefits for an employee who continues to work after normal retirement age. This particular provision has generated considerable criticism on the ground that it results in a substantial loss of retirement benefits to employees who choose to work beyond normal retirement. The provision constitutes an exception to the otherwise uniform rule that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations. This memorandum will deal with the legal basis for the position set forth in the amended I.B.; and with the question of whether the Commission should consider a change which would require continued accrual of benefits after normal retirement age.

As originally enacted in 1967, the ADEA generally protected individuals aged 40-65 from discrimination in employment because of age. However, the exception in Section 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2), provided:

> (f) "It shall not be unlawful for an employer, employment agency, or labor organization -- ***
> (2) to observe the terms of a bona fide seniority system ... or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual....

Pursuant to this provision, the Labor Department issued an Interpretative Bulletin on "Costs and benefits under employee benefit plans," which stated in part:

EXHIBIT A

> [A]n employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefits plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. [29 CFR §860.120 (a); 34 Fed. Reg. 9709 (June 21, 1969 (emphasis added).]

This provision of the I.B. was based on the statutory language and the legislative history which indicated that employers were not required to provide older workers exactly the same pension benefits.

During the floor debates, Senator Javits, who introduced the amendment that became section 4(f)(2) (See 113 Cong. Rec. 7016-1077) elaborated on the effects of section 4(f)(2):

> The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers. [113 Cong. Rec. 31254-55 (emphasis added).]

Senator Yarborough, Chairman of the Subcommittee on Labor who sponsored the legislation for the Administration (see 113 Cong. Rec. 2467) and acted as the bill's floor manager (See 113 Cong. Rec. 31252), expressly concurred in Senator Javits' interpretation:

> I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plans.... This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan. [113 Cong. Rec. 31255 (emphasis added).]

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) with the stated purpose of assuring that employees actually receive the pension benefits promised them upon retirement. See 29 U.S.C. §1001(b), and (c). Accordingly, ERISA's requirements were keyed to "normal retirement age," and did not generally address the subject of retirement benefits for employees who work beyond such an age. ("Normal retirement age" was set by ERISA at "the earlier of -- (A) the time a plan participant attains normal retirement age under the plan, or (B) the later of -- (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan" (26 U.S.C. §411(a)(8); 29 U.S.C. §1002(25).)

Subsequently, in conjunction with the Department of Labor, the Internal Revenue Service issued regulations which did touch on the subject. See 42 Fed. Reg. 42336, 42339 (Aug. 23, 1977).

> Postponed retirement. A plan shall not be treated as failing to satisfy the requirements of [ERISA] merely because no benefits under the plan accrue to a participant who continues service with the employer after such participant has attained normal retirement age. [26 CFR §1.411(b)-1(b)(2)(ii)(E) and -1(b)(3)(ii)(C).]
>
> Employment after retirement. No actuarial adjustment to an accrued benefit is required on account of employment after normal retirement age. [26 CFR §1.411(c)-1(f)(2).]

These regulations simply make explicit that which is already implicit in ERISA: that the statute does not generally deal with retirement benefits for employees who work beyond normal retirement age and, consequently, does not generally require continued accrual or actuarial adjustment of retirement benefits to account for post-"normal retirement age" work.

At the time the ERISA regulations were under administrative advisement in 1977, Congress had before it proposed legislation forbidding involuntary retirement because of age and lifting the upper age limit on ADEA coverage from age 65 to 70. One of the questions which arose during consideration of those amendments was whether the change would cause conflicts with ERISA. Accordingly, within just a few days after the ERISA regulations became final, Senators Williams and Javits (respectively, the chairman and the ranking minority member of the Senate Human Resources Committee) addressed a letter to Donald Elisburg, the Labor Department's Assistant Secretary for Employment Standards. Senator Javits requested "a written opinion from the Department addressing all potential conflicts between ERISA and the proposed amendments to the ADEA" and posed five specific questions. See S. Rep. No. 95-493 (1977), pp. 13-14; reprinted in 1978 U.S. Code Cong. & Admin. News 988-89.

In reply, Assistant Secretary Elisburg stated that "[r]aising the upper age limit of ADEA would not create any conflict with ERISA." With regard to the specific questions he provided the following answers:

> Question 1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?
> Answer. It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual.
>
> Question 2. Would an employer be required to pay the actuarial equivalent or normal retirement benefits to an employee who continues to work beyond the normal retirement age?
> Answer. No. There will not have to be any adjustment in the size of the periodic payments at the time of actual retirement. This is also the case under ERISA.
>
> * * *
>
> Question 4. Would an increase in the upper age limit of the ADEA increase the funding costs for private pension plans?
> Answer. An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until the Act's

> upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also stem from the fact that, as indicated above, a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it.

* * *

> Question 5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?
>
> Answer. In our opinion, a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA. Under Section 4(f)(2) of the ADEA, it is not unlawful to observe the terms of a bona fide pension plan that is not a subterfuge to evage the purposes of the ADEA. As I noted in my testimony the legislative history of the ADEA indicates that Section 4(f)(2) was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid. We believe that it will run counter to the intent of the Act to require a plan to provide for benefit accrual after the plan's normal retirement age. [S. Rep. No. 95-493, pp. 15-16; reprinted in 1978 U.S. Code Cong. & Admin. News 990-91.]

During the passage of the 1978 amendments to the ADEA these answers of Assistant Secretary Elisburg were repeatedly echoed by the House and Senate leaders who guided the passage of the ADEA amendments. See e.g., 123 Cong. Rec. H9977 (daily ed., Sept. 23, 1977; remarks of Cong. Hawkins), S17274 (daily ed., Oct. 19, 1977; remarks of Sen. Williams), S17276 (daily ed., Oct. 19, 1977; remarks of Sen. Javits).

Moreover, when it became clear that the ERISA rules and Elisburg's comments concerning accrual and actuarial adjustment applied only to "Defined Benefit Plans," 1/ these Congressional leaders extended their previous remarks to provide a similar treatment of "Defined Contribution Plans." 2/ All of these remarks purported to be consistent with Section 4(f)(2) of the 1967 ADEA.

Sec. 4(f)(2) of the Act was amended to include the following language at the end of the existing provision:

> ...and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

On its face, the amendment addresses merely the question of involuntary retirement (which had been the subject of an adverse Supreme Court decision), and makes no reference whatever to the question of retirement benefits. Furthermore, that the amendment was restricted to the involuntary retirement issue is clear from the "Joint Explanatory Statement of the [House-Senate] Committee of Conference":

1/ See 124 Cong. Rec. H2271 (daily ed., March 21, 1978); remarks of Cong. Dent and Hawkins), S4450 (daily ed., March 23, 1978; remarks of Sen. Williams and Javits).

2/ Ibid.

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age. [H.R. Rep. No. 95-950 (1978), p. 8; reprinted in 1978 U.S. Code Cong. & Admin. News 1001.]

Given these facts, in my opinion the 1977-78 Congress was merely affirming a purpose of the Act as it was passed in 1967. The original provision of Section 4(f) (2) concerning pension benefits remained unchanged, for the 1978 amendment deals only with affirming the original Congressional intent concerning involuntary retirement. Under these circumstances, the other Comments of the 1977-78 Congress (those not embodied in the language of the amendment and the conference Report) concerning the purpose of the unchanged portion of Section 4(f)(2) do not rise to the level of controlling legislative history. Indeed the Supreme Court has already had two occasions to reject precisely such subsequent Congressional statements in interpreting the 1967 ADEA.

In United Air Lines v. McMann, 434, U.S. 192 (1977), the Court interpreted the original language of ADEA Section 4(f) (2) to permit involuntary retirements because of age. That conclusion was based, in part, on explicit statements made by Senator Javits (and others) during consideration of the 1967 legislation. On the other hand, the Court rejected the contrary statements of Senator Javits (and others), made in 1977 during consideration of the then-pending ADEA amendments, that one of the original purposes of Section 4(f)(2) was --supposedly--to prohibit involuntary retirements because of age. The court expressly noted that "[l]egislative observations 10 years after passage of the Act are in no sense part of the legislative history" 434 U.S. at 200, n.7.

Even after the ADEA amendments were enacted in 1978, the Supreme Court rejected Congress' reappraisal of the original congressional intent where the provision in question was not changed. In Oscar Mayer & Co. v. Evans, ___ U.S. ___, 99 S.Ct. 2066, 60 L. Ed. 2d 609 (1979), the Court was "not persuaded" by an interpretation of a 1967 provision which was put foward in the 1977 Senate committee report and even explicitly adopted in the 1978 conference committee report. "Senate Report No. 493 was written 11 [sic] years after the ADEA was passed in 1967 and such '[l]egislative observations... are in no sense part of the legislative history'" (99 S.Ct. at 2072; 60 L. Ed. 2d at 617). "'It is the intent of the Congress that enacted [the Section]... that controls'" (Ibid., quoting from Teamsters v. United States, 431 U.S. 324, 354, n.39 (1977), construing Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972).

In drafting the amended I.B., the Labor Department, however, chose to give controlling weight to the observations of Assistant Secretary Eligburg, rather than to the language of the statutory amendment and the Conference Report. Thus, the preambles of both the proposed and final interpretation state that "[t]he legislative history of the 1978 Amendments establishes one exception to the otherwise uniform rule under section 4(f)(2) that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations." 43 Fed. Reg. 43265 (Sept. 22, 1978); 44 Fed. Reg. 30649 (May 25, 1979) (emphasis added). The exception, of course, concerns the treatment of retirement benefits for employees who continue to work beyond normal retirement age. As I have noted, in my opinion that interpretation is not based upon established principles of statutory interpretation.

In addition, the general rule that exceptions contained in remedial and humanitarian legislation should be narrowly construed militates against the interpretation that the Department of Labor has given to Section 4(f)(2). Section 4(f)(2) of the ADEA was expressly labeled by Congress as an "exception" to the statutory prohibition of age discrimi-

nation. H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), pp. 4, 9, reprinted in 1967 U.S. Code Cong. & Admin. News 2217, 2222; S. Rep. No. 723, 90th Cong., 1st Sess. (1967), pp. 4, 9, reprinted in 113 Cong. Rec. 31250, 31251-52.

Long before the ADEA was enacted, it was settled law under the Fair Labor Standards Act (FLSA) that exceptions to it must be narrowly construed and limited to those circumstances plainly and unmistakably within its terms and spitit. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

Congress expressly directed that the ADEA was to be enforced in accordance with the "powers, remedies, and procedures" of the FLSA. Section 7(b), 29 U.S.C. §626(b). (emphasis added.) In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court therefore concluded that settled principles of FLSA judicial interpretation must be applied to the ADEA where appropriate. In Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974), the Supreme Court applied the FLSA rule to an Equal Pay Act case involving sex-based wage differentials. Accordingly, the FLSA rule on exceptions must also be applied to Section 4(f)(2) of the ADEA.

For the above stated reasons, it is my opinion that the provisions in the DOL Interpretive Bulletin of May 25, 1979 on employee benefit plans concerning pension accruals after normal retirement age are incorrect and that the Commission should therefore undertake a further amendment to the Interpretive Bulletin. The simplest change would be to revert to the position set forth in the original Interpretive Bulletin on Employee Benefit Plans. Under this interpretation, an employee continues to accrue pension benefits after normal retirement. However, an employer is allowed to make reductions in those benefits as long as the actual amount of costs incurred on behalf of an older worker is equal to that incurred on behalf of a younger worker.

Such a change could have both economic and political effects, and this office was asked to comment on them in this memorandum. We have received conflicting advice on what the economic effects would be and their significance, and do not believe we are in a position to draw any conclusion. We would recommend that the Commission publish for public comment an amendment to the I.B. reverting to the original position concerning accrual of pensions after normal retirement age. The Commission could expect to receive for consideration a broad range of comments from employers, labor organizations and insurance industry actuaries on the economic impact of such a change. With regard to the possible political effects, the Commission may wish to make appropriate contacts through the Office of Congressional Affairs to ascertain Congressional reactions to such a change.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

for SCEP meeting of
Oct 31

MEMORANDUM

TO: SCEP

THRU: Leroy D. Clark
General Counsel

Charlotte Frank
Director
Office of Field Services

FROM: Constance L. Dupre CLD
Associate General Counsel
Legal Counsel Division

SUBJECT: Proposals for the revision of the Pension Accrual Provisions of the Interpretative Bulletin on Employee Benefit Plans

The purpose of this memorandum is to bring to SCEP's attention the alternative proposals available to the Commission when considering changes to the Pension Accrual Provisions of the Interpretative Bulletin on Employee Benefit Plans issued by the Department of Labor on May 25, 1979, 43 Fed. Reg. 30648. 1/ This memorandum will attempt to present a concise analysis of the specific problems raised by the provisions in the current Interpretative Bulletin (hereinafter referred to as the "IB") and the extent to which those problems can be eliminated by the use of the available alternatives which are presented.

On May 25, 1979, the Department of Labor published in the Federal Register an amendment to its Interpretative Bulletin dealing with employee benefit plans. The Interpretative Bulletin was in response to suggestions made by Congress in 1978 at the time it amended section 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. that the Department of Labor issue more comprehensive guidance with respect to section 4(f)(2), particularly because of the increase in the maximum age level of those covered by the Act. 2/ See 124 Cong. Rec. H2271 [daily ed. Mar. 21, 1978] [remarks of Rep. Hawkins]; 124 Cong. Rec. S.4451 [daily ed. Mar. 23, 1978] [remarks of Sens. Williams and Javits]. More specifically, the increase in the maximum age level of those individuals covered by the Act raised questions about many common benefit practices affecting employees at age 65. The Interpretative Bulletin on Employee Benefit Plans (IB) addressed many of the questions left unanswered by changes in the Act.

1/ Attached hereto as Exhibit one.

2/ Section 4(f)(2) of the Act reads as follows:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization--
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual;

The main thrust of the IB was to set forth the permissible methods of analysing employee benefit costs to insure compliance with the rule established by section 4(f)(2) of the Act which has been interpreted to require that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations. With regard to retirement benefits, the I.B. manifested a significant change over the previous D.O.L. interpretation on employee benefit plans, see 29 C.F.R. §860.120(a). 3/ More specifically, the previous interpretation stated, in part, that:

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. [29 CFR §860.120(a)]

The across the board approach of the previous §860.120 with regard to retirement costs incurred for all employees was then significantly altered by the combination of the five-year extension of the Act's protections and the new IB on pension accrual in employee benefit plans. Thus, the following practices are permitted by the current IB:

> §860.120(f)(iv)(B) [44 Fed. Reg. at 30661]
>
> (1) A defined contribution plan may provide for the cessation of employer contributions after the normal retirement age of any participant in the plan. A defined contribution plan may also provide that no employer contributions shall be made on behalf of an employee who is hired after normal retirement age.
>
> * * * *
>
> (3) A defined benefit plan may fail to credit, for purposes of benefit accrual, service which occurs after an employee's normal retirement age.
>
> (4) A defined benefit plan need not adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age. [A defined contribution plan would have to pay the balance in the individual account.]
>
> (5) A defined benefit plan need not provide for the accrual of benefits for an employee who continues to work after normal retirement age.
>
> * * * *
>
> (7) A defined benefit plan need not take into account salary increases and benefit improvements under the plan which take place after an employee reaches the normal retirement age specified in the plan with respect to those employees continuing their employment beyond that age. However, benefit improvements for retirees may not be denied to such employees who do not receive the advantage of benefit accruals and increases given younger employees.

3/ See the attached memorandum from the General Counsel to the Commission dated August 30, 1979.

In general, the problems which arise as a result of the foregoing interpretations concern 1) the accrual of benefits for employees between age 65 and 70, 2) actuarial adjustments of retirement benefits for employees who postpone retirement by working beyond age 65, and 3) crediting post-65 salary increases and years of service for the purposes of retirement benefit plans. The current IB expressly permits an employer to avoid each practice enumerated in 1-3 above. Insofar as each of these practices arguably constitutes a distinct hardship for employees between the ages of 65 and 70, each will be separately analyzed.

Problem one revolves around the concept of benefit accrual. Each year an employee participates in a pension plan he earns credits toward his retirement benefit. In the case of a defined contribution plan, contributions are made at regular intervals by the employer based on an employee's participation in the plan. For defined contribution plans, the process of accrual is represented by the monthly or yearly contributions made by the employer on behalf of a participating employee. In the case of defined benefit plans, retirement benefits are determined by a formula which most frequently utilizes such factors as years of service and salary as the basis for determining retirement benefits. The process of accrual relative to defined benefit plans is one whereby an employee is credited with each year of service or salary increase in computing his benefit upon retirement. Regardless of the plan, however, continued accrual permits an employee to enhance his retirement benefit up to the maximum benefit allowable under the plan.

The 1978 amendments to the Act extended coverage in the private sector to age 70. However, the IB on Employee Benefit Plans indicated that an employer can cease contributions after normal retirement age 4/ in non-supplemental defined contribution plans, see 44 Fed. Reg. 30661; §860.120(f)(iv)(B)(1)) and may fail to credit post-65 service for the purposes of defined benefit plans, see 44 Fed. Reg. 30661; §860.120(f)(iv)(B)(3)). The practical result of this interpretation is that while an employee can work beyond age 65, there is no way he can enhance his retirement benefits. Naturally, this practice acts as a disincentive to work beyond age 65.

The second major problem raised by the IB and mentioned earlier regards the actuarial adjustments of retirement benefits for employees who postpone retirement by working beyond age 65. The current IB does not require an employer to make actuarial adjustments to the retirement benefits of employees in defined benefit plans who work beyond age 65. To illustrate the problem we will use the example of employee A who is entitled to $100,000.00 upon retirement at normal retirement age of 65. Based on a life expectancy of 10 years, employee A would be paid $10,000. per year for 10 years if he retired at age 65. If, however, he worked beyond age 65 he would encounter two problems. One, as discussed earlier, he could not accrue any more pension credits to enhance his retirement benefits and two, based on the same life expectancy of 75 he would still receive $10,000 per year but for fewer years by virtue of his postponed retirement. Effectively, based on the same life expectancy, the employee is deprived of benefits he would have received had he retired at age 65. Suffice it to say that not only is this a strong disincentive to work beyond age 65, but also a windfall to employers maintaining these types of plans.

4/ While each plan is free to set its "normal retirement age," the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1001 et seq., requires that, in any event, the normal retirement age of a plan covered by ERISA be at age 65 or after 10 years participation in the plan, whichever is later.

The third problem raised by the IB is related to the first two. As currently written, the IB on Employee Benefit Plans does not require a defined benefit plan to take into account salary increases and benefit improvements under the plan which take place after an employee reaches normal retirement age. (See 44 Fed. Reg. 30661; §860.120(f)(iv)(B)(7)). Thus, an employee working beyond age 65 gets no credit in his retirement computation for any post-65 salary increases or for any benefit improvements made in the plan during his post-65 years of service.

Plainly, the IB on employee benefit plans is a triple-headed hydra for the post-65 employee. It permits an employer to:

1) stop crediting for the purposes of accrual all service beyond age 65,

2) refuse to make actuarial adjustments in retirement benefits for employees who continue in service beyond age 65, and

3) refuse to take into account salary increases and benefit improvements under the plan which take place after the normal retirement age specified in the plan.

Four alternative approaches to the current IB, or any combination thereof, are presented for your consideration.

Alternative A

In response to problem one, this alternative would require an employer to credit all post-normal retirement age service for the purposes of benefit accrual. This option would require an employer to give credit for post-65 years of service regardless of whether the employee had reached full accrual by the time he reached normal retirement age in the plan.

While this alternative carries the "equal cost" principle of the IB to its logical extreme, it goes so far as to require contributions after full accrual has already taken place. [Such a practice (unlimited accrual) is not required by ERISA and might arguably result in significantly greater cost to plans.] In addition, this alternative would create a conflict with one of ERISA's accrual rules (the "3 percent rule") which does not allow for accruals after 33 1/3 years of participation in a plan. Furthermore, this alternative would most heavily penalize those liberal employers whose plans provide for earlier accrual dates.

Alternative B

Alternative B is a moderate variation of Alternative A. This Alternative would require post-normal retirement age benefit accrual for all employees in a plan who are not fully accrued by the time they reach the normal retirement age in a plan. This alternative would accommodate those ERISA rules which permit plan limitations on accruals but would also enable the employee not yet at full accrual to enhance his retirement benefits through additional years of service. This proposal adheres to the cost standard which underlies the IB for all employees except those who are fully accrued at normal retirement age.

Alternative C

This proposal deals with the problem created by the current IB in that it does not require an employer to make actuarial adjustments to the retirement benefits of employees who continue in service beyond age 65. (*See* 44 Fed. Reg. 30661; §860.120(f)(iv)(B)(4)). The result for employees is that working beyond age 65 causes a reduction in their total retirement benefit because payments will still be made based on the benefit accrued in relation to years between normal retirement age and life expectancy. Take, for example, Employee A who has fully accrued retirement benefits at the normal retirement age of his plan, i.e., were he to retire at the normal retirement age he would receive the maximum benefits possible. Assume that the normal retirement age is 65, his entitlement is $100,000.00 and his life expectancy is age 75. Based on these figures, the plan would probably provide for payments of $10,000.00 per year. Employee B, however, who had also earned full benefits by age 65, would also receive $10,000.00 per year even if he chose to work until age 70. The obvious result is a windfall for employers in that the funds are not required to pay out the actuarial equivalent in benefits depending on the projected life expectancy from *actual retirement*. Alternative C would require plans to make this actuarial adjustment to insure that accrued retirement benefits are not compromised by an employee's decision to remain in the work force. Thus, should Employee B remain in the work force until age 70, his benefits would have to be actuarially adjusted to $20,000 per year, not $10,000.

Alternative D

This Alternative deals with the facial inequity in allowing employers to refuse to take into account salary increases and benefit improvements under the plan which take place after the normal retirement age specified in the plan. *See* 44 Fed. Reg. 60661; §860.120(f)(iv)(B)(7). This is important for those employees whose plans integrate high years of salary and/or benefit improvements under the plan into the final computation of retirement benefits. The inequality of depriving someone of credit for salary increases and benefit improvements merely because they occur during post-normal retirement age service is apparent. The alternative here is to withdraw the former interpretation and require that changes in salary or benefit plan improvements be taken into account for post-normal retirement age employment.

In conclusion, we wish to note that each of the four proposed alternatives deals with a specific problem arising from the pension accrual rules of the current I.B. Any or all of these alternatives can be combined in a written interpretation whose purpose is to rectify some or all of the issues raised herein. While some preliminary work in drafting proposals on the accrual rules has been done, these proposals are not included for your review at this stage because of their technical nature and also because of the initial need for policy guidance regarding the number of issues the Commission feels require action.

CONFIDENTIAL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEP 0 3 1980

MEMORANDUM

TO: Eleanor Holmes Norton
Chair

Daniel E. Leach
Vice Chair

Ethel Bent Walsh
Commissioner

Armando M. Rodriguez
Commissioner

J. Clay Smith, Jr.
Commissioner

THRU: Preston David PD
Executive Director

FROM: Constance L. Dupre CLD
Associate General Counsel
Legal Counsel Division

SUBJECT: Bulletin on Employee Benefit Plans under the Age Discrimination in Employment Act of 1967, as amended.

The issue of proposed changes to the existing Interpretative Bulletin on Employee Benefit Plans (the "IB"), 44 Fed. Reg. 30648 (May 25, 1979), was first brought to SCEP's attention during the months immediately following the transfer of functions on July 1, 1979. Subsequently, in October, a summary of the inequities involved with the "IB" as it relates to employees who continue to work beyond normal retirement age was presented to SCEP. The October memorandum then attempted to outline in general terms four possible ways of modifying the current "IB" to counteract those identified inequities. At that time, the memorandum indicated that requiring employers to make actuarial adjustments to the retirement benefits of employees who continue in service beyond normal retirement age and crediting post-normal retirement age salary increases and years of service appeared to be the two simplest and most administratively manageable methods of dealing with the identified inequities. As a result of that SCEP meeting, instruction was given to draw up specific interpretations and to solicit comments from the Department of Labor and the Internal Revenue Service regarding the proposed changes pursuant to Executive Order 12067.

In response to those instructions, specific proposals for revision of the existing interpretation were drafted and sent to the Department of Labor, the Internal Revenue Service, the President's Commission on Pension Policy and the Department of Justice. Informal comments from those agencies were received and the original draft was modified and then sent to SCEP by memorandum dated March 27, 1980. That memorandum suggested that the modified document be circulated to appropriate federal agencies for formal comments. After receiving instructions to that affect, the modified document was circulated to those same federal agencies for formal comment pursuant to Executive Order 12067 on April 25, 1980. In addition to formal comments received from the Department of Labor, there has been one meeting and considerable verbal communication regarding the proposals, especially with the Internal Revenue Service. Internal Revenue Service comments have been of vital assistance in assuring that the proposed modifications do not infringe on tax qualification matters entrusted to the jurisdiction of the Department of the Treasury, and to a lesser degree, pension matters under ERISA which are under the auspices of the Department of Labor.

Several changes have been made to the proposed document. First, and perhaps most obvious, is the deletion from the original draft of the requirement that employees hired within five (5) years of normal retirement age be included in defined benefit plans. That proposal has been deleted for two major reasons. First, Section 202(a)(2) of ERISA specifically permits a defined benefit plan to exclude from participation employees hired within 5 years of normal retirement age. While the ADEA may legally require more than is required by ERISA, the Commission would be ill-advised to require such an inclusion, thereby creating the appearance of conflict with the statute governing pension matters. In addition, such a proposal originally contemplated that the amount to be expended on behalf of employees hired within five years of normal retirement age be equal to that annual amount spent on the oldest employees who are required to be included in the plan. However, after consultation with an actuary we have been advised that it is administratively unfeasible to calculate that amount due to the manner in which defined benefit plans are funded. For those reasons, the proposal that would require an employer to include employees hired within 5 years of normal retirement age in defined benefit plans has been excluded.

The existing interpretation requires post normal retirement age contributions only for defined contribution plans which are deemed "supplemental" to other coexisting benefit plans. Our original proposal suggested retention of the "supplemental" distinction with a redefinition of that term to apply only to those defined contribution plans which do not provide for a "specific and reasonable benefit goal" at normal retirement age. However, upon reconsideration we are convinced that such a standard is too vague both to provide guidance to employers and to facilitate enforcement efforts. To the extent that there exists no cost justification for the cessation of contributions at normal retirement age, the proposed rule has been modified to apply uniformly to all defined contribution plans.

Finally, the proposal has been modified to clarify the relationship between long term disability benefits and pension benefits. Numerous questions have been received in this area and the proposal has been rewritten to make clear that the Commission does not interpret the ADEA to require the simultaneous payment of long term disability benefits and pension benefits. The proposal has been rewritten to make clear that for those employees disabled at later ages on whose behalf disability benefits must be paid beyond normal retirement age, an employer can, at the employee's election, postpone the payment of pension benefits until the disability benefits are exhausted. The proposal explicitly indicates that such a postponement must be done in accordance with all ERISA rules regarding the commencement of benefits and prohibited forfeitures.

Accordingly, it is recommended that the attached document be published in the Federal Register as a proposed change to the current interpretative bulletin on employee benefit plans, with a solicitation for public comment. Upon receipt and evaluation of those comments, the Commission can then prepare a final document, if it so desires.

CMACKARONIS/dt

CONFIDENTIAL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 860, 1625

Employee Benefit Plans; Proposed Guidelines on the Application of the Age Discrimination in Employment Act of 1967 to Retirement and Pension Plans; Proposed Recodification of 29 CFR Part 860.120.

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed partial rescission of Interpretative Bulletin; Proposed Interpretive Rules.

SUMMARY: Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 [May 9, 1978], responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq. [ADEA or "Act"] was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The transfer became effective and the Commission assumed enforcement of this Act on July 1, 1979.

After enactment of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 [approved April 6, 1978], the Department of Labor published in the Federal Register of September 22, 1978, a proposed amendment to the Interpretative Bulletin, 29 CFR Part 860, with respect to employee benefit plans. After considering written comments as well as testimony at a hearing on the proposed amendment, the Department revised the original proposal and published it in final form on May 25, 1979. Pursuant to its authority under the Act, the Commission proposes the accompanying rescission of certain sections of that document and new interpretive rules on the

application of the ADEA to retirement and pension plans.

DATES: Written comments must be received within ninety (90) days of this publication and must be submitted in quadruplicate to: Executive Secretariat, EEOC, 2401 E Street, N.W., Washington, D.C. A copy of all public documents may be examined between 9:00 a.m. and 5:30 p.m. normal business hours at Room 2003, EEOC, 2401 E Street, N.W., Room 2254, Washington, D.C. 20506. The entire record, or any part thereof, may be purchased at the actual cost of duplication as computed pursuant to the fee schedule at 29 C.F.R. 1610.15(a).

FOR FURTHER INFORMATION CONTACT: John J. Pagano, Office of the General Counsel, Legal Counsel Division, Room 2254, EEOC, 2401 E Street, N.W., Washington, D.C., (202) 634-6595.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Commission has under consideration a proposal to rescind §860.120(f)(1)(iv) and §860.120(f)(2)(ii) of the Department of Labor's Interpretative Bulletin on Employee Benefit Plans, which deals with the application of section 4(f)(2) [29 U.S.C. 623(f)(2)] of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq., to pension and retirement plans, and publish new interpretive rules.

On November 30, 1979 the Commission published in the Federal Register its proposed substantive interpretations under the ADEA to replace those interpretations which currently appear at 29 C.F.R. Part 860. However, those proposed interpretations do not address the problems arising under Section 4(f)(2) of the Act regarding employee benefit plans. Many of those problems were addressed by the Department of Labor in an Interpretative Bulletin on

Employee Benefit Plans which was published on May 25, 1979. See 44 Fed. Reg. 30648 (May 25, 1979). The interpretations contained in that bulletin are currently in effect. See 44 Fed. Reg. 37974 (June 29, 1979).

In amending section 4(f)(2) in 1978, Congress made clear that the Department of Labor (which then had responsibility for the administration and enforcement of the Act) should issue more comprehensive guidance with respect to section 4(f)(2), particularly because of the increase in the maximum age level of those covered by the Act from 65 to 70 years of age. See 124 Cong. Rec. H 2271 (daily ed. Mar. 21, 1978) (remarks of Rep. Hawkins); 124 Cong. Rec. S. 4451 (daily ed. Mar. 23, 1978) (remarks of Sens. Williams and Javits)

In response to that suggestion, the Department of Labor promulgated an amendment to its Interpretative Bulletin on Employee Benefit Plans which was intended to provide more comprehensive guidance regarding the operation of all forms of employee benefit plans. 44 Fed. Reg. 30648 (May 25, 1979). The Department of Labor, in drafting its final interpretations of May 25, 1979, promulgated various special rules applicable only to pension and retirement plans.

In promulgating these special rules for the operation of pension and retirement plans, the Department of Labor relied heavily on remarks contained in a letter from its own Assistant Secretary for Employment Standards, Donald Elisburg, to Senators Williams and Javits. See S. Rept. No. 95-493, 95th Cong., 1st Sess. 14-16 (1977); 123 Cong. Rec. H. 9977, daily ed. Sept. 23, 1977. Assistant Secretary Elisburg's letter was in response to a letter from Senators

Williams and Javits (respectively, the Chairman and the ranking minority member of the Senate Human Resources Committee) which had requested "a written opinion from the Department addressing all potential colflicts between ERISA and the proposed amendments to the ADEA" and posed five specific questions. See S. Rept. No. 95-493 (1977), pp. 13-14; reprinted in 1978 U.S. Code Cong. and Admin. News, 988-89.

In reply, Assistant Secretary Elisburg's letter stated that "[r]aising the upper age limit of the ADEA would not create any conflict with ERISA." He then responded specifically to each of the questions posed in the letter from Senators Williams and Javits. No. 95-492, pp. 15-16; reprinted in 1978 U.S. Code Cong. & Admin. News 990-91.

Based entirely on this portion of the legislative history concerning the 1978 amendments to the ADEA, 44 Fed. Reg. at 30649, the Department of Labor promulgated special rules regarding pension and retirement plans. Briefly summarized, those rules interpret the ADEA to permit pension plans (1) to cease employee contributions at normal retirement age, (2) to fail to credit years of service, salary increases and benefit improvements which occur after an employee reaches the normal retirement age specified in the plan, and (3) to fail to adjust actuarially the benefit accrued as of normal retirement age for an employee who continues work beyond that age.

The transfer to the EEOC of administrative and enforcement authority under the ADEA took place on July 1, 1979, shortly after the publication of the May 25, 1979, interpretation. Just prior to assuming its responsibilities under the ADEA, the Commission published a notice in the

Federal Register indicating that "the Commission has undertaken a complete review of the Department of Labor Interpretations (29 C.F.R. Part 860) and Opinion Letters issued by the Wage and Hour Administrator of the Department of Labor." 44 Fed. Reg. 37974 (June 29, 1979). The Commission has completed an exhaustive review of the Department of Labor's interpretation on employee benefit plans which has included consideration of numerous comments received by the Commission since it assumed jurisdiction on July 1, 1979. The Commission's review, the comments received and the Commission's practical experience with the statute have led to the conclusion that the special rules concerning pension plans which were promulgated in the interpretative bulletin by the Department of Labor should be modified to the extent that they currently result in the discriminatory treatment of employees aged 65 to 70. The Commission bases this conclusion on several factors.

First, the Commission believes that the existing interpretation runs counter to the stated purposes of the statute as enacted in 1967. Section 2(b) of the ADEA, 29 U.S.C. §621(b), states unequivocally that:

> It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment;....

With these purposes in mind, Congress fashioned Section 4(a) of the Act as detailing the employer conduct which was proscribed by the Act. Section 4(a) states in pertinent part that:

> Sec. 4. (a) It shall be unlawful for an employer -

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

* * * *

29 U.S.C. §623(a). On its face, Section 4(a) identifies various types of discrimination which are forbidden by the statute. There can be no doubt that the Act comprehensively deals with discrimination with respect to terms, conditions, or privileges of employment as well as with employment opportunities. The statute constitutes remedial and humanitarian legislation and as such is to be liberally construed. The Commission believes it consistent with congressional intent to give the widest possible scope to the statute in combating all forms of age discrimination. The Commission believes this goal can best be accomplished by modifying the existing interpretation in a manner which will narrow the current interpretation of the exception contained in Section 4(f)(2) of the Act.

Second, the Commission believes that modification of the existing interpretation is necessary to harmonize it with the 1967 legislative history which accompanies Section 4(f)(2) of the ADEA. The Commission recognizes that Congress did not act in a vacuum when it passed the ADEA in 1967. Congress recognized that the cost of providing certain benefits to older workers is greater than providing those same benefits to younger workers. Requiring that equal benefits be provided to employees regardless of age, Congress feared, would discourage the employment of older workers. S. Rep. No. 723, 90th Congress, 1st Session 14 (1967); 113 Cong. Rec. 31254-55 (1967). To avoid what would have been a disastrous result for older employees, Congress fashioned a narrow exception to the specific prohibitions of the Act. That exception reads:

> It shall not be unlawful for an employer, employment agency, or labor organization - ... to observe the terms of ... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, ... 29 U.S.C. §623(f)(2).

The exception contained in Section 4(f)(2) constitutes explicit recognition by Congress of the need to effectuate the central purpose of the Act in a way that was not ultimately detrimental to the very employees it was designed to protect. As explained by Senator Javits, the minority manager of the ADEA, during the passage of the original bill in 1967, Section 4(f)(2) is:

> ... particularly significant ... since in its absence employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them.

S. Rept. 723, 90th Cong., 1st Sess. [1967] p. 14; 113 Cong. Rec. 31254-31255; quoted on 44 Fed. Reg. 30648 (May 25, 1979). For that very reason, Congress recognized that certain types of employee benefit plans may legitimately vary benefits based on age due to the increased cost of providing certain benefits to older workers. The result was the exception contained in Section 4(f)(2) of the Act. In light of the remedial nature and the humanitarian purposes of the statute, the Commission believes that the interests of the protected individuals will best be served by a narrow interpretation of the Section 4(f)(2) exception. Toward this end, the Commission proposes to interpret Section 4(f)(2) to permit the otherwise prohibited payment of varied benefits based on age so long as such a practice can be justified on the basis of varying cost to purchase those benefits. The Commission believes this interpretation to be consistent with the 1967 legislative history of the Act.

During the floor debates, Senator Javits, who introduced the amendment that became section 4(f)(2) (See 113 Cong. Rec. 7076-1077) elaborated on the effects of section 4(f)(2):

> The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an empoyer if it is adopted merely as a subterfuge for discriminating against older workers. [113 Cong. Rec. 31254-55] (emphasis added).

Senator Yarborough, Chairman of the Subcommittee on Labor who sponsored the legislation for the Administration (see 113 Cong. Rec. 2467) and acted as the bill's floor manager (See 113 Cong. Rec. 31252), expressly concurred in Senator Javits' interpretation:

> I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plans.... This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan. [113 Cong. Rec. 31255 (emphasis added).]

Relying, at least in part, on this legislative history, the Commission proposes to modify the existing interpretation to reflect the principle that a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. While the existing interpretation generally follows that principle, the "special rules" which were promulgated regarding pension and retirement plans permit an employer to completely disregard that principle for employees who continue in service beyond the normal retirement age specified in their plans. The result is that those employees who continue in service beyond normal retirement age are denied benefits not based on cost but based solely on their age and are thereby denied many of the protections of the Act. The Commission does not believe that result to be in accordance either with the purposes of the statute or its legislative history.

Third, the Commission considers its proposed modifications to be consistent with the Department of Labor's 1969 interpretation of Section 4(f)(2). See 29 C.F.R. §860.120(a) (1969). The Commission believes that the contemporaneity of that interpretation with the passage of the Act entitles it to substantial weight in interpreting the statute. That interpretation stated in pertinent part that:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefits plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. (emphasis added)

29 C.F.R. §860.120, 34 Fed. Reg. 9709 (June 21, 1969). That interpretation remained unchanged through two statutory amendments to the Act

(1974 and 1978) and was the applicable interpretation at the time of the 1978 amendments. Had Congress disagreed with the 1969 interpretation, it was free to change it. Congress did not. Moreover, the interpretation was explicitly approved in the 1978 legislative history in a statement by Senator Javits on the Senate floor. In commenting on Section 4(f)(2), Senator Javits stated:

> The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> *Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.* (emphasis added).

(124 Cong. Rec. S. 4450-S. 4451, daily ed., March 23, 1978): Such explicit congressional approval of a principle embodied in an existing statutory interpretation of the enforcing agency is not to be lightly disregarded.

Furthermore, the Commission believes that adherence to this principle will result in the most effective harmonization of the remedial purposes of the statute and the purposes of the Section 4(f)(2) exception. In the context of the remedial purposes of the statute, the

Commission views the primary purpose of Section 4(f)(2) as the need to permit differential benefits in instances where requiring equal benefits would be cost prohibitive to an employer and would thereby discourage the employment of the very people the Act was designed to protect. Contrary to many comments already received by the Commission, the Commission does not believe that this purpose of the exception can only be furthered by permitting the complete cessation of benefits at normal retirement age. Rather, the Commission believes that requiring the equal treatment of post normal retirement age employees will strike the most effective balance between the purposes of the Act and the exception. To allow the complete cessation of benefits would produce the anomalous result of making those older workers "cheap" labor deprived of many benefits not because of cost but age. The Commission is loathe to attribute that intent to Congress absent an unequivocal expression of it.

Fourth, for several reasons, the Commission does not regard as conclusive several portions of the 1978 legislative history which were relied on by the Department of Labor and which have been cited in numerous comments received by the Commission. Undeniably, the letter quoted earlier from Assistant Secretary of Labor Donald Elisburg provided Congress with the Department of Labor's current interpretation regarding certain post-normal retirement age benefits. S. Rept. No. 95-493, pp. 15-16. Reprinted in 1978 U.S. Code Cong. & Admin. News 990-91. That letter was in response to specific congressional concern that the 1978 ADEA amendments not produce any conflicts with ERISA. While Mr. Elisburg's letter was referenced by several Congressmen, see e.g., 123 Cong. Rec. H9977 (daily ed., Sept. 23, 1977; remarks of

Cong. Hawkins), S17274 (daily ed., Oct. 19, 1977; remarks of Sen. Williams), S17276 (daily ed., Oct. 19, 1977; remarks of Sen. Javits), there are numerous remarks in that same legislative history which reflected congressional approval of the existing interpretation. See e.g., 123 Cong. Rec. S10954 (daily ed., June 28, 1977; remarks of Sen. Javits), S17274 (daily ed., Oct. 19, 1977; remarks of Sen. Williams); 124 Cong. Rec. S 4450-4451 (daily ed. March 23, 1978; remarks of Sen. Javits). The Commission views these strands of legislative history as inconclusive and ambiguous regarding the application of the Section 4(f)(2) exception. In light of this ambiguity, the Commission believes that the central purposes of the Act will better be served by its modifications to the existing interpretation.

Additionally, the Commission notes that the 1978 legislative history contains explicit approval of the equal cost principle in general, and as it applies specifically to employee benefits other than pension or retirement benefits. Senator Williams, Chairman of the Senate Human Resources Committee, in discussing Section 4(f)(2) stated that:

> The purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or disability benefit plans. Of course, there must be some reason other than age which justifies the unequal benefits.
>
> * * * *
>
> There may be valid distinctions which can be made between older persons and younger persons with respect to the costs of providing term life insurance, for example. Section

> 4(f)(2) was intended to permit and will continue to permit varying coverage of workers in different age groups to reflect those differences so long as they are based on valid assumptions and applied in a nondiscriminatory manner. (emphasis added)

123 Cong. Rec. S 17274 (daily ed. Oct. 19, 1977). In a statement quoted supra., Senator Javits, ranking minority member of the Senate Human Resources Committee, made almost identical remarks. See 124 Cong. Rec. S. 4450-4451, daily ed., March 23, 1978). Insofar as neither the 1967 Act nor its legislative history draws any distinction between the treatment of employee benefit plans under Section 4(f)(2), the Commission is hesitant to draw such a distinction based on legislative history 11 years later relating to an unchanged portion of the Act. This position gains additional support from the unambiguous approval of the equal cost principle in the subsequent legislative history as it applies to both pension and non-pension benefits. See 123 Cong. Rec. S 17274 (daily ed., Oct. 19, 1977).

Finally, while the Commission readily acknowledges that the 1978 legislative history is ambiguous regarding the application of the Section 4(f)(2) exception to employee benefit plans, the Commission does not view that legislative history as controlling. Section 4(f)(2) was enacted in 1967 as part of the original statute and has remained unchanged regarding employee benefit plans for over 13 years, unaffected by statutory amendments enacted in both 1974 and 1978. That the 1978 amendments to Section 4(f)(2) dealt only with the issue of involuntary retirement is made clear from the "Joint Explanatory Statement of the [House-Senate] Committee of Conference":

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age. [H.R. Rep. No. 95-950 (1978), p. 8; reprinted in 1978 U.S. Code Cong. & Admin. News 1001.]

Moreover, the issue of the treatment, under the ADEA, of post normal retirement age workers has existed since the passage of the Act in 1967. While the Act's coverage between 1967 and 1978 did not protect workers beyond age 65, there can be no doubt that many pension and retirement plans had normal retirement ages of less than 65 during that time. Employees participating in those types of plans were still protected by the statute during years of post-normal retirement age employment. Therefore, the question of the treatment of post-normal retirement age employees under pension and retirement plans has existed since 1967. Contrary to what many commentors have suggested, the issue of what conduct is required by the ADEA of an employer relative his post-normal retirement age employees, was not a creature of the 1978 amendments to the statute. The issue existed at the passage of the ADEA in 1967 and must be resolved in accordance with the statute and its 1967 legislative history.

The Commission is acutely aware of the admonishment of the United States Supreme Court in United Air Lines v. McMann 434 U.S. 192 (1977) and Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) where the Court stated that "[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history" 434 U.S. at 200, n.7. For that reason, the Commission does not view as controlling legislative observations made in 1978 which addressed an issue which existed under the statute since its inception. Acceptance of that legislative history 11 years after passage of the Act would retroactively deprive many employees of protections afforded they by the original statute.

Accordingly, the Commission proposes revision of the current rules applicable to retirement and pension plans contained in Section 860.120(f)(1)(iv) and 860.120(f)(2)(ii) as described in the following section-by-section analysis:

§1625.13(a)(1)

The currently applicable interpretation at §860.120 (f)(1)(iv)(B)(1) permits a defined contribution plan to discontinue contributions on behalf of individuals hired after normal retirement age. The currently applicable interpretation as contained in subsection 860.120 (f)(1) (iv)(A) fails to note that section 202(a) (1) (B)(ii)(2) of the Employment Retirement Income Security Act (ERISA) would not permit the exclusion of individuals on the basis of age from defined benefit plans which provide for a normal retirement age of 65 (or younger) or a specified number of years of service (greater than five) whichever is later. The proposed rule would prohibit the exclusion of individuals on the basis of age from a defined contribution plan or a defined benefit plan which has no specified normal retirement age.

§1625.13(a)(2)

Subsection 860.120(f)(1)(iv)(A) of the currently applicable interpretation refers only to defined benefit plans and the prohibition of exclusion under ERISA and under the ADEA of individuals hired more than five years before the normal retirement age. It is proposed that this rule be clarified to apply only to defined benefit plans which specify a definite retirement age and not to those plans which include a provision for a normal retirement age based on years of service. (This is in accordance with the above cited provision of ERISA.)

§1625.13(a)(3)

Subsection 860.120(f)(1)(iv)(A) of the currently applicable interpretation permits a defined benefit plan to exclude individuals hired less than five years before the normal retirement age specified in the plan. This principle remains unchanged in the proposed rule.

Subsection 860.120(f)(1)(iv)(B)(1) of the currently applicable interpretation permits the cessation of contributions to a non-supplemental defined contribution plan for post normal retirement age workers. The proposed rule would not permit a cessation of contributions for post normal retirement age service in defined contribution plans.

§1625.13(b)(2)

Subsection 860.120(f)(1)(iv)(B)(2) of the currently applicable interpretation makes no recognition of the Internal Revenue Code requirement that termination forfeitures must be used to reduce employer contributions in money purchase defined contribution plans. The proposed rule would modify the currently applicable rule which states that "... employee termination forfeitures are typically allocated to individual accounts ..." to reflect the circumstances in money purchase plans.

§1625.13(b)(3)

The proposed rule would not differ substantially from the rule with respect to defined contribution plans contained in §860.120(f)(1)(iv)(B)(4), sentence 2.

§1625.13(b)(4)

The proposed rule would not differ from the currently applicable interpretation in §860.120 (f)(1)(iv)(B)(6) with respect to amending plans to provide benefits at actual retirement age rather than normal retirement age.

§1625.13(b)(5)

Subsection 860.120(f)(2)(ii) of the currently applicable interpretation does not permit the inclusion of pension or retirement benefits in a benefit package. The proposed rule is substantially unchanged.

§1625.13(b)(6)

The currently applicable interpretation in 860.120(f) (1)(iv)(B) includes no reference to the limitations on receivable pension benefits contained in ERISA and the Internal Revenue Code. The proposed rule contains a reference to those sections of the Code containing such limitations.

§1625.13(b)(7)

The currently applicable interpretations in subsections 860.120(f)(1)(iv)(B)(4) and (7) do not require either a recalculation of the normal retirement benefit for service occurring after the normal retirement age or an actuarial equivalent of the normal retirement benefit available at that age for individuals retiring later. The proposed interpretation sets forth two alternatives and the Commission invites comments on each approach. Under the first alternative, it is proposed that employers provide for an increase in the benefit receivable from a defined benefit plan by means of an actuarial adjustment of the normal retirement benefit at the later retirement age including the interest accumulated on the fund which can be actuarially attributed to the individual's benefit. The second alternative would require a recalculation of the normal retirement benefit to include years of service (up to the maximum as specified in the plan), salary increases, and benefit improvements which occur after an individual's normal retirement age with respect to all employees retiring later. The Commission welcomes specific comments on the ramifications of each approach in terms of plan costs, benefit to employees and potential effects on plan administration.

With regard to defined contribution plans, the Commission is desirous of receiving the following information/data:

(a) statistics on and/or descriptions of plans to which contributions are made on behalf of employees working beyond the normal retirement age in the plan;

(b) statistics on and/or descriptions of the types of formulas utilized to determine contributions to specific plans, i.e., percentage of salary, flat dollar amount, etc.;

(c) statistics on and/or examples of the normal retirement age in specific plans;

(d) statistics on and/or examples of employers who currently have employees working beyond the normal retirement ages specified in their defined contribution plans and estimates of the number of such employees and their percentages in the work force.

With regard to defined benefit plans, the Commission is desirous of receiving the following information/data:

(a) statistics on and/or examples of employers maintaining defined benefit plans who currently have employees working beyond the normal retirement age and estimates of the number of such employees and their percentages in the work force;

(b) statistics on and/or examples of plans which provide actuarial adjustments to employees working beyond the normal retirement age;

(c) statistics on and/or examples of plans which credit years of service, salary increases or benefit improvements which occur after normal retirement age;

(d) statistics on and/or examples of plans which exclude employees from participation on the basis of a maximum specified age and which do not provide for such exclusions;

(e) statistics on and/or examples of plans which specify a normal retirement age in terms of age only and those which specify a normal retirement age in terms of age or years of participation;

(f) statistics on and/or examples of the formulas used to determine the normal retirement benefit categorized as: (i) flat amount; (ii) flat percentage of earnings; (iii) flat amount per year of service; (iv) percentage of earnings per year of service; and (v) other formulas if the above are not applicable;

(g) statistics on and/or examples of plans with offsets for Social Security benefits and information on types of formulas used to achieve such offsets;

§1625.13(b)(8)

The currently applicable interpretation in subsection 860.120(f)(1)(iv)(B)(8) would not permit a Social Security offset plan to use the Social Security benefit available at actual retirement age for such an offset in the case of a participant whose benefit at normal retirement age is not increased by post normal retirement age service. The proposed rule would permit an offset on the basis of the Social Security benefit available at actual retirement date where the participant's benefit from the plan has undergone an increase corresponding to any increase in his or her Social Security benefit.

It is proposed that the following new section 1625.13 rescind and replace subsections 860.120(f)(1)(iv) and 860.120(f)(2)(ii) of the Department of Labor Interpretative Bulletin, Part 860, Title 29 of the Code of Federal Regulations~~,~~ as follows:

§1625.13 Participation and benefits under retirement and pension plans--Application of section 4(f)(2) of the Act.

(a) Participation.

(1) No employee may be excluded on the basis of age from a defined contribution plan or from a defined benefit plan which provides for a retirement date at a specified age or a specified number of years of service (greater than five), whichever is later.

(2) With respect to defined benefit plans which provide for a normal retirement date at a specified age only (such as 65) and which are not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C., 1001, 1003(a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded on the basis of age from such plans. (With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case.)

(3) An Employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA.

Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

(b) Benefits. In addition to the requirements as set forth elsewhere in this section, the following rules apply to benefits provided under a retirement or pension plan.

(1) A defined contribution plan may not provide for a cessation or reduction of employer contributions on the basis of age of a participant in the plan nor may an employer fail to make contributions on the basis of age to a defined contribution plan on behalf of an employee who is hired after normal retirement age.

(2) In a defined contribution plan where investment gains and losses and/or employee termination forfeitures are allocated to individual accounts instead of being used to reduce employer contributions, the allocations shall not be made less favorably on the basis of age to older employees (including those who continue to work past normal retirement age) than to younger employees.

(3) A defined contribution plan (including a target benefit plan) must pay the balance in the individual account at a participant's actual retirement date with respect to individuals who continue to work past normal retirement age.

(4) A defined benefit plan may provide and may be amended to provide that retirement benefits will commence at the actual date of retirement under the terms of the plan in question rather than at normal retirement age. Employees receiving long term disability benefits as salary replacement may elect to continue receiving those benefits beyond normal retirement age in lieu of pension or retirement

benefits if they are so entitled. Such an election must be made in accordance with all applicable laws, rules, and regulations, including but not limited to Sections 203(a) and 206(a) of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§1053(a) and 1056(a).

(5) Retirement benefits may not be included in a "benefit Package" for the purpose of determining the application of an exception under section 4(f)(2).

(6) The payment of benefits under the foregoing rules may be reduced to the extent necessary to comply with the limitations contained in the Internal Revenue Code such as those contained in Section 401(j) and 415 (not all inclusive). [These rules would be supplemented by one of two alternative positions. The first alternative is:

"(7) A defined benefit plan must adjust actuarially the benefit accrued as of normal retirement age (with the inclusion of accumulated interest which is actuarially attributable to the individual's accrued benefit) for all individuals retiring later than normal retirement age.")

The second alternative is:

"(7) A defined benefit or target plan may not fail to credit years of service (up to the maximum as specified in the plan) or salary increases which take place after an employee reaches normal retirement age nor may the plan fail to take into account benefit improvements under the plan which take place after an employee reaches the normal retirement age specified in the plan, with respect to those employees continuing their employment beyond that age. Such re-calculation, however, may not result in a lesser benefit at a later retirement age than that which would have been available at normal retirement age.

(8) A defined benefit plan which includes offsets for Social Security may offset the benefit receivable by participants at actual retirement with the amounts of Social Security benefits receivable at that time. However, such an offset may not represent an amount which is proportionately greater than the amount which could have been offset from the pension benefit payable at normal retirement age.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MAR 2 1982

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MEMORANDUM

TO: SCEP

FROM: Michal J. Connolly
General Counsel

SUBJECT: The Department of Labor's Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. §860.120

The purpose of this memorandum is to bring to SCEP's attention an issue regarding the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq.*, "ADEA," which has yet to be resolved by the Commission. The issue concerns the current status of the Department of Labor's Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. §860.120 (the "IB"). That bulletin had been a direct result of the 1978 amendments to the ADEA which had increased the upper level of coverage of the Act from age 65 to 70 and, *inter alia*, had amended Section 4(f)(2) to include an express prohibition on involuntary retirement. In so doing, Congress had instructed the Department of Labor to issue more comprehensive guidance with respect to all forms of employee benefit plans. *See* 44 F.R. 30645. The DOL did so by issuing the Interpretative Bulletin on Employee Benefit Plans, commonly known as the "IB."

As you may recall, after assuming jurisdiction over the ADEA, this office commenced an indepth review of all existing interpretations of the DOL, including the "IB." That review resulted in the issuance by the Commission of proposed interpretations on November 30, 1979, 44 F.R. 68858, and final interpretations on September 29, 1981. 46 F.R. 47724. Those final interpretations did not deal with matters covered in the "IB" however, as that particular interpretation had been segregated for separate review and consideration by the Commission. 1/ The review focused on several issues arising under the "IB," the most important of which was an apparent inequity created by the specific portions of the "IB" that deal with post-normal retirement age contributions to pension and retirement plans. More specifically, the review centered on those portions of the "IB" which permit employers to discontinue pension and retirement contributions for employees who work beyond the normal retirement age specified in their retirement plans (generally age 65).

This office was instructed by the Commission in the latter part of 1980 to develop a document for the *Federal Register* which would propose for public comment the modification of those portions of the "IB" that deal with the issue of post-normal retirement age pension contributions. Since that time, no formal action has been taken by the Commission either to adopt, rescind, or withdraw the interpretation.

1/ The *Federal Register* notice of September 29, 1981, containing the final ADEA interpretations indicated that the Interpretative Bulletin on Employee Benefit Plans "will remain in effect in accordance with the Commission's *Federal Register* notice of June 29, 1979. *See* 44 F.R. 37974. Upon completion of its substantive review of that interpretation, the Commission will publish any proposed modifications to that document for notice and comment in the *Federal Register*. The existing interpretation, along with any modifications made by the Commission, will eventually be set forth at 29 C.F.R. 1625.10."

Following the assumption of my responsibilities as General Counsel, I have reviewed the outstanding issues presented by the "IB" with respect to post-normal retirement age pension and retirement contributions. I find myself in agreement with the position taken by the Department of Labor. The focus of the Department of Labor's concerns as expressed in the preamble to the "IB" were sections of the 1978 legislative history which reflect congressional concern that raising the upper level of coverage of the Act not interfere with existing pension and retirement plans. Congress was explicitly concerned that the ADEA amendments not alter the requirements of the Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq., "ERISA", with respect to pension and retirement plans. In order to clarify the situation, the Chairman and ranking minority member of the Senate Committee on Human Resources sought assurances from Assistant Secretary of Labor Donald Elisburg that the contemplated amendments would not create any conflict with ERISA nor would they lead to higher pension costs for employers. Assistant Secretary Elisburg provided those assurances which were in turn cited favorably by several Senators and Congressmen during the ensuing floor debates. Elisburg's letter stated specifically that "a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA." The letter was an integral part of the legislative history. The Senate Report contained the full text of the letter. See S. Rept. No. 95-493, 95th Cong., 1st Sess. (1977) pp. 13-16. The report expressly stated that the letter, in its detailed remarks about pensions and retirement plans, "reaffirms the committee's intent in this regard." Id., p. 5. Reflecting this intent, the report added that the legislation under consideration "does not require the accrual of additional benefits or the payment of the actuarial equivalent of normal retirement benefits to employees who choose to work beyond the plan's normal retirement date." Id. In addition to these statements of intent in the Senate Report, the Chairman of the Senate Committee on Human Resources indicated on the Senate floor during final passage of the bill that the Elisburg letter accurately reflected the legislative intent. Congressional Record, March 23, 1978, pp. S4450-51, daily ed.

On the House side, the Elisburg letter also reflected legislative intent. The letter had not yet been written at the time the House Report was published, but the report nevertheless stated that the proposed amendments "do not require that any additional benefits, benefit accruals or actuarial adjustments be provided other than those required under ERISA." H.R. Rept. No. 95-527, Part 1, 95th Cong., 1st Sess. (1977), p. 9. After the Elisburg letter had been sent to the Chairman of the House Subcommittee, Representative Hawkins, he inserted it in the Congressional Record. See September 23, 1977, p. H9977, daily ed. During final passage of the bill in the House, Representative Hawkins characterized the letter as reflecting "the general view of the House" with regard to the matters it discussed. See Congressional Record, March 21, 1978, p. H2271, daily ed.

Moreover, business community support for the 1978 extension of coverage of the act from age 65 to 70 was apparently based in large part on assurances from Congress that such an extension would not increase pension costs. That assurance was provided by congressional approval of the Elisburg letter, which ultimately formed the basis for the provisions in the "IB" concerning pension accruals after normal retirement age. It is my recommendation that the Commission adopt the Department of Labor's position in this area.

In addition, practical considerations require agency action in this area. While neither adopted, modified, nor withdrawn, the "IB" remains "in effect" by virtue of the Commission's Federal Register announcement of June 29, 1979. 44 Fed. Reg. 37974. The absence of final agency action regarding the "IB" has resulted in considerable confusion among both employers and employees. More significantly, however, for the second time in two years the agency has been sued in federal district court in what amounts to a challenge to those sections of the "IB" regarding post-normal retirement age pension contributions.

In January, 1980, Farmer's Group, Inc., an employer with more than 10,000 employees, filed suit in Federal District Court for the District of Columbia alleging that various portions of the "IB" which required them to make post-normal retirement age contributions to their "supplemental" retirement plan were invalid. The agency successfully defended the suit on the grounds that the agency's active reconsideration of the "IB" prevented the issues from being ripe for judicial review. The United States Court of Appeals for the District of Columbia Circuit affirmed on appeal the decision of the District Court that the case was not ripe for review but cautioned:

> We should add, however, that lengthy delay in the final promulgation of an interpretation said to be under reconsideration might, at some point, affect our view of the interests involved. Such delay could well be viewed as lessening the chance that the final interpretation may be promulgated before the EEOC or a private party moves toward enforcement. In addition, delay past some point undercuts the force of an agency's assertion that meaningful reconsideration is taking place.

Farmers Group, Inc. v. Donovan, et al. No. 80-2110 (Nov. 5, 1981). Less than two months after the Court of Appeals decision in Farmer's Group, the agency was once again sued in the same federal district court, this time by two employees and the class of individuals who they purport to represent. Von Aulock et al. v. EEOC, Civil No. 81-2959 (D. D.C. 1981). The suit seeks a declaratory judgment that those portions of the "IB" which permit employers to discontinue pension and retirement contributions at normal retirement age are invalid.

Should the agency not act either to adopt, modify, or withdraw the "IB," it will become increasingly difficult to argue in federal court that the interpretation is still under "meaningful reconsideration." Both employers and employees are without practical guidance due to its uncertain status and the prospect of continued litigation becomes increasingly possible. In light of the explicit caution from the Court of Appeals, this office recommends that the agency move as expeditiously as possible toward adoption of the existing interpretation.

Substantive Comments in Response to the Commission's invitation for Public Comments of September 15, 1983

1.	The cessation of benefits at normal retirement age is discriminatory	11
2.	The cessation of pension contributions and crediting at normal retirement age constitutes a reduction in income	1
3.	Employers reap a substantial and undeserved windfall from the current interpretations	3
4.	There is no cost difference for full plan participation between workers beyond the normal retirement age and younger workers	3
5.	Multi-employer plans already provide for full service crediting beyond the normal retirement age	1
6.	Plans should at least be required to provide an actuarial adjustment to reflect postponed retirement	2
7.	The practical result of the current interpretations is to provide a strong disincentive to work beyond the normal retirement age	2
8.	A change in the current interpretations would be contrary to the 1978 legislative history	2
9.	The current interpretations are not supported by the applicable 1967 legislative history	1
10.	The only Federal courts to address the issue of retirement contributions for post-normal retirement age employment have either required an actuarial adjustment or continued contribution	1
11.	Any change in the current interpretations would conflict with ERISA	3
12.	Requiring contributions and crediting beyond the normal retirement age would not conflict with ERISA	1
13.	Continued contributions and crediting would increase pension plan costs	2
14.	Pensions should be limited to a specified percentage of gross pay	1
15.	Individuals providing technical data in response to the specific questions presented	5
16.	The current regulation should be eliminated	2
17.	The current regulation completely disregards its practical impact on the working aged	1
18.	There is no basis in the legislative history for the distinction between primary and "supplemental" pension plans	1

EXHIBIT F

U.S. Senate.
Committee on Human Resources.
Washington, D.C., August 29, 1977.

Mr. Donald Elisburg.
Assistant Secretary for Employment Standards, U.S. Department of Labor, Washington, D.C.

Dear Mr. Elisburg: During your testimony before the Labor Subcommittee concerning proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA), you stated that raising the ADEA age limit would not create any conflicts with respect to the Employee Retirement Income Security Act of 1974 (ERISA). Other witnesses suggested that this may not be the case.

EXHIBIT 9

In order to aid us in our deliberations, we would appreciate a written opinion from the Department addressing all potential conflicts between ERISA and the proposed amendments to the ADEA, and answering the following questions:

1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?
2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?
3. If the upper-age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?
4. Would an increase in the upper-age limit of the ADEA increase the funding costs for private pension plans?
5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

As you know, the Subcommittee has scheduled a markup of the proposed legislation for September 8, 1977. We would, therefore, appreciate a response as soon as possible.

With best wishes,

Sincerely,

Harrison A. Williams, Jr.,
Chairman.
Jacob K. Javits.
Ranking Minority Member.

U.S. Department of Labor.
Office of the Assistant Secretary
for Employment Standards.
Washington, D.C.

Hon. Harrison A. Williams, Jr.,
Chairman, Committee on Human Resources,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in reply to your and Senator Javits' letter of August 29, 1977, in which you request the Department's response to a number of questions concerning any potential conflicts between the Employment Retirement Income Security Act of 1974 (ERISA) and the proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA).

As I indicated in my testimony before the Senate Labor Subcommittee, raising the upper age limit of the ADEA would not create any conflict with ERISA. Those responsible for administering ERISA in the Department of Labor are in complete agreement that the proposed amendments would not interfere with any of the provisions of ERISA.

[page 15]

The following represents the Department's answers to your specific questions:

Question 1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?

Answer. It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual. There is a section in ERISA which limits the extent to which a plan may provide for the accrual of benefits at a higher rate during later and presumably higher paid years of service. This provision, section 204, sets forth three alternative tests, one of which a plan must meet in order to demonstrate that benefits are being accrued properly (29 U.S.C. 1054). Two of these tests (the 33⅓ percent test and the fractional test) explicitly permit a plan to provide that no benefits will accrue after normal retirement age (26 CFR 1. 411(2)-1). The third test requires the accrual of benefits after normal retirement age. It should be noted, however, that no employer is required to select the third test, provided that he satisfies one of the two other tests.

Question 2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?

Answer. No. There will not have to be any adjustment in the size of the periodic payments at the time of actual retirement. This is also the case under ERISA. See the final regulations issued by the Internal Revenue Service under section 411 of the Code and section 204 of ERISA which provide that no adjustment to an accrued benefit is required on account of employment after normal retirement age [(26 CFR. section 1.411(c)-1(f)(2))]

Question 3. If the upper age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?

Answer. Generally, pension plans condition the payment of benefits on actual retirement. Thus, it would not be necessary to amend these plans since neither they nor the ADEA nor ERISA require the payment of retirement benefits to employees who continue to work beyond normal retirement age. The requirement in ERISA (section 206(a)) is that benefits must commence at normal retirement age or on the actual date of retirement, whichever is later (29 U.S.C. 1056). Of course, if there are some plans which provide for the payment of pension benefits at a specified age, regardless of actual retirement, such plans could be amended without violating either the ADEA or ERISA.

Question 4. Would an increase in the upper age limit of the ADEA increase the funding costs for private pension plans?

Answer. An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until the Act's upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also stem from the fact that, as indicated above, a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it.

It is possible that certain plans, such as those which provide for the accrual of benefits after normal retirement age, will not experience these savings. However, there will be no significant cost increase to these plans. Any increases in benefits due to such factors as salary increases after employees have attained normal retirement age would generally be offset by factors such as the shorter life expectancy of employees upon retirement after normal retirement age, interest earned on plan assets during the period between normal retirement age and the age at which employees actually retire, and increases in pre-retirement mortality.

Question 5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

Answer. In our opinion, a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA. Under Section 4(f)(2) of the ADEA, it is not unlawful to observe the terms of a bona fide pension plan that is not a subterfuge to evade the purposes of the ADEA. As I noted in my testimony, the legislative history of the ADEA indicates that Section 4(f)(2) was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid. We believe that it will run counter to the intent of the Act to require a plan to provide for benefit accrual after the plan's normal retirement age.

I might also note that the proposed amendments to the upper age limit in Section 12 of the ADEA would in no manner affect the definition of the term "normal retirement age" in Section 3(24) of ERISA.

I hope these responses to your questions will be helpful to the subcommittee.

Sincerely

DONALD ELISBURG,
Assistant Secretary.

TABULATION OF VOTES

LABOR SUBCOMMITTEE

Senator Williams' amendment in the nature of a substitute to S. 1784 as introduced. (Adopted by unanimous voice vote.)

The bill, as amended, was ordered reported to the committee by unanimous voice vote.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

MEMORANDUM

APR 30

TO: SCEP

FROM: Constance L. Dupre CLD
Legal Counsel

SUBJECT: Public Comments in Response to the Commission's Federal Register Notice of September 15, 1983, Regarding Pension Benefits at Normal Retirement Age

The purpose of this memorandum is to provide the Commission with an analysis of the public comments received in response to the Commission's solicitation in the Federal Register regarding post-normal retirement age pension contributions under the Age Discrimination in Employment Act of 1967, as amended, "ADEA." 48 F.R. 41436 (Sept. 15, 1983). In order to assist the Commission in its consideration of the pertinent issues, the discussion of the public comments will be prefaced by a complete summary of the review of this matter at the Commission.

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I. COMMISSION REVIEW

The Commission has been engaged in a substantive review of the Department of Labor's Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. §860.120 (the "IB"), since 1979. That bulletin had been a direct result of the 1978 amendments to the ADEA which had increased the upper level of coverage of the Act from age 65 to 70 and, inter alia, had amended Section 4(f)(2) to include an express prohibition on involuntary retirement. In so doing, Congress had instructed the Department of Labor to issue more comprehensive guidance with respect to all forms of employee benefit plans. See 44 F.R. 30648 (May 25, 1979). The DOL did so by issuing the Interpretative Bulletin on Employee Benefit Plans, commonly known as the "IB."

Shortly after assuming jurisdiction over the ADEA on July 1, 1979, the Office of General Counsel, Legal Counsel Division, commenced an in-depth review of all existing interpretations of the DOL, including the "IB." That review resulted in the issuance by the Commission of proposed interpretations on November 30, 1979, 44 F.R. 68858, and final interpretations on September 29, 1981. 46 F.R. 47724. Those final interpretations did not deal with matters covered in the "IB", however, as that particular interpretation had been segregated for separate review and consideration by the Commission. 1/ The review focused on several issues arising under the "IB", the most important of which was an apparent inequity created by the specific portions of the "IB" that deal with post-normal retirement age contributions to pension and retirement plans. More specifically, the review centered on those portions of the "IB" which permit employers to discontinue pension and retirement contributions for employees who work beyond the normal retirement age specified in their retirement plans (generally age 65).

Briefly summarized, the controversial provisions of the "IB" (hereinafter referred to as the "special rules") permit employers to:

(1) fail to make pension contributions for service after normal retirement age,

(2) fail to credit years of service or salary increases which occur after normal retirement age, and

(3) fail to adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age. See 29 C.F.R. §860.120(f) (1)(iv)(B)(1)-(7).

In a comprehensive memorandum to the Commission dated August 30, 1979, former General Counsel Leroy D. Clark summarized the inequities presented by the DOL interpretation. Exhibit A. As Clark's memorandum pointed out, the provision which permits employers to cease pension crediting at normal retirement age "has generated considerable criticism on the ground that it results in a substantial loss of retirement benefits to employees who choose to work beyond normal retirement." Exhibit A, p.1. The Clark memorandum analyzed "the legal basis for the position set forth in the amended I.B.," Exhibit A, p.2, and concluded "that the interpretation [the "IB"] is not based upon established principles of statutory construction." Exhibit A, p.10. The memorandum recommended "that the Commission should therefore undertake a further amendment to the Interpretative Bulletin." Exhibit A, p. 11.

Shortly thereafter, a memorandum from Constance L. Dupre, Associate General Counsel, Legal Counsel Division, was sent to SCEP which outlined in detail the practical consequences of the provisions of the "IB" on post-normal retirement age benefits. Exhibit B. That memorandum analyzed the financial ramifications of the "IB" to the working elderly and concluded that "[t]he practical result of this interpretation is that while an employee can work beyond age 65, there is no way he can enhance his retirement benefits." Exhibit B, p.5. As that memorandum continued, "not only is this a strong disincentive to work beyond age 65, but [the absence of an actuarial adjustment is] also a windfall to employers maintaining these types of plans." Exhibit B, p.6.

1/ The Federal Register notice of September 29, 1981, containing the final ADEA interpretations indicated that the Interpretative Bulletin on Employee Benefit Plans "will remain in effect in accordance with the Commission's Federal Register notice of June 29, 1979. See 44 F.R. 37974. Upon completion of its substantive review of that interpretation, the Commission will publish any proposed modifications to that document for notice and comment in the Federal Register. The existing interpretation, along with any modifications made by the Commission, will eventually be set forth at 29 C.F.R. 1625.10."

The agency's Legal Counsel Division subsequently proceeded to draft amendments to the "IB" which incorporated alternatives B, C, and D set forth in the October, 1979, memorandum to SCEP. See Exhibit B. Staff development of proposed modifications to the "IB" necessitated frequent consultation with the Internal Revenue Service to ensure that agency proposals did not interfere with IRS enforcement of the Internal Revenue Code in the pension area. By memorandum dated March 27, 1980, General Counsel Clark and former Director of Field Services Charlotte Frank sent a comprehensive proposal to SCEP for consideration and possible formal agency coordination pursuant to Executive Order 12067. Exhibit C. The proposal was approved by SCEP and in April, 1980, was sent to the Internal Revenue Service and the Department of Labor for formal coordination.

From April through September of 1980, agency staff met frequently with staff from the IRS to resolve any remaining technical problems associated with the Commission's proposal. No comment, formal or otherwise, was received from the Department of Labor during this period, notwithstanding the fact that the Commission had requested formal coordination comments by May 19, 1980. Staff proceeded to finalize a comprehensive document for publication in the Federal Register which would have proposed the amendment to the controversial provisions of the "IB" dealing with post-normal retirement age pension contributions. That document was sent to the Commission by memorandum dated September 3, 1980, and was ultimately scheduled for Commission vote on October 21, 1980. See Exhibit D.

Just two days prior to the Commission's scheduled vote on the amendments to the "IB," the Department of Labor responded with a lengthy analysis of the Commission's initial draft proposal of April, 1980. DOL's letter contained technical questions regarding the language of the initial proposal (virtually all of which had been resolved through extensive consultation with the IRS from April to September) and at the same time disputed the Commission's view of the legislative history to the 1978 amendments. See Exhibit A, pp. 2-10. Former Chair Eleanor Holmes Norton then removed the item from the Commission agenda on the day preceeding the meeting.

More recently, former General Counsel Michael J. Connolly recommended to SCEP that the Commission adopt the "IB" as it was written by the Department of Labor. See Memorandum from Connolly to SCEP dated March 25, 1982, Exhibit E. Connolly's recommendation was based on his interpretation of the effect of the 1978 legislative history and was directly contrary to the position taken by former General Counsel Clark. In essence, Connolly concluded, as had the Department of Labor, that the enforcing agency was bound by the remarks contained in the 1978 legislative history to the ADEA. Acting on Connolly's recommendation, SCEP instructed staff of the Legal Counsel Division to prepare a document for Federal Register publication which would adopt the existing controversial provisions of the "IB."

After consultation with the Commission's former Office of Policy Implementation, the Legal Counsel Division prepared a document for publication in the Federal Register which would adopt the DOL interpretations without modification. In December of 1982, that document was presented to SCEP for approval and transmittal to the Commission. SCEP then instructed this office to prepare an options paper for the Commission, outlining in detail the various alternatives concerning the controversial provisions of the Interpretative Bulletin. On March 15, 1983, this office presented the Commission with the three principal alternatives, viz. adopt, modify or rescind the provisions of the IB dealing with post-normal retirement age employment. The Commission then instructed staff to develop a document for publication in the Federal Register which would solicit technical and financial information regarding the practice of discontinuing pension benefits at normal retirement age. In August, 1983, the Commission approved such a document and it was subsequently published in the Federal Register on September 15, 1983. 48 F.R. 41436. The following is a summary of all the public comments received in response to that publication. 2/

II. THE PUBLIC COMMENTS

The Commission received thirty-three comments in response to its Federal Register notice of September 15, 1983. Simultaneously with the publication of the Commission's notice, an article by Cyril Brickfield was published in Modern Maturity urging its readers to write to the Commission to encourage the rescission of the "special rules" regarding pension contributions. That article apparently precipitated in excess of 650 comments by individual employees or interested members of the public. Because of the timing and the relevance of those comments, they have all been included in this office's review and are summarized below.

A. Comments urging that the Current Interpretation be Modified

Without exception, the more than 650 letters addressed to the Chairman that were precipitated by Mr. Brickfield's column urged that the existing interpretations be modified. In addition, of the thirty-three comments received in specific response to the Federal Register notice, more than one-third were submitted by individuals who indicated that while they did not possess the technical data requested they believed the current interpretations to be discriminatory and unfair.

Substantively, the comments expressing dissatisfaction with the current interpretations can be grouped into several broad categories. First, in one way or another they all conveyed the point that the current practice of discontinuing pension contributions and crediting at normal retirement age was per se discriminatory. In so doing, many comments focused on the fact that a cessation of pension contributions constitutes a reduction in real income for the working elderly. Numerous comments argued that it is no more expensive to provide pension contributions and crediting for older workers than it is for their younger counterparts, many of them citing the information paper prepared by Anna M. Rappaport for the Select Committee on Aging. See Rappaport, A. An Analysis of the Costs of Pension Accrual After Age 65, 97th Cong., 2nd Sess., No. 97-323 (1982). Many others argued that employers who, in reliance on the Interpretative Bulletin, fail to continue pension contributions and crediting beyond normal retirement age and also fail to provide an actuarial adjustment for delayed retirement reap a substantial monetary windfall from employees who continue to work. The practical result of the operation of the "special rules" is to substantially reduce the real value of the pension in proportion to the length of continued employment. As many commentors concluded, it is obvious that a reduction in the real value of the pension presents a substantial disincentive to work beyond normal retirement age. Thus, as the American Association of Retired Persons (AARP) argued, by discouraging the continued employment of older workers, the provisions of the Interpretative Bulletin are in direct conflict with the purposes of the 1978 amendments to the ADEA. Finally, as substantial numbers of commentors indicated, the lawful use of strong financial disincentives to continued employment appear facially inconsistent with and counter-productive to administration and congressional objectives of relieving the financial burdens on the Social Security system by, inter alia, increasing the age of Social Security eligibility and encouraging continued employment.

2/ A summary of the comments is attached hereto as Exhibit F.

B. Comments Opposing any Change to the Interpretative Bulletin

Seven of the thirty-three comments received urged that the Commission maintain the existing provisions regarding post-normal retirement age pension contributions. Those seven comments fall into the three distinct groupings set forth below. 3/

1) A Change in the Current Interpretations Would be Contrary to the 1978 Legislative History to the ADEA.

Two commentors argued that any change in the existing interpretative rules would be contrary to the 1978 legislative history to the ADEA. 3a/ Indeed, it was the 1978 legislative history that provided the impetus for the DOL interpretations in the first instance. See 44 F.R. 30649 (May 25, 1979). The October, 1980, letter from Secretary of Labor Ray Donovan to Chair Eleanor Holmes protesting the Commission's contemplated changes similarly relied on the 1978 legislative history. In contrast, one extensive comment argued that the 1978 legislative history was inapplicable and that the 1967 legislative history did not support the current interpretations, the same result reached by former General Counsel Clark in his memorandum to the Commission dated August 30, 1979. See Attachment A. Amidst the as yet unresolved controversy, we review both segments of the legislative history.

The administration's proposed bill for the ADEA, S.830, introduced in 1967, contained no provisions for the observance of bona fide employee benefit plans. Recognizing the potential problems in the area of pension benefits, Senator Jacob Javits, minority manager of the bill, declared that:

> "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problems. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.
>
> "That flexibility is what we recommend.
>
> "We also recommend that the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment."

Hearings on S.830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess, 27 (1967). Consequently, Javits introduced the amendment which became §4(f)(2) because:

3/ There may well be circumstances in the administrative rulemaking process where a detailed analysis of only seven public comments is unwarranted. We deem the following analysis advisable, however, insofar as the comments addressed raise substantive objections which must be resolved prior to formal action by the Commission.

3a/ Cf. Von Aulock et al. v. Smith, 33 FEP Cases 3; 32 EPD ¶33,870 (D.C. Cir. 1983), wherein the court, while expressly not deciding the issue, cited portions of the 1978 legislative history which would support the existing "special rules."

> . . .in its absence employers might actually have been discouraged from hiring older workers because of the increased cost involved in providing certain types of benefits to them.

S.Rept. No. 723, 90th Cong., 1st Sess., 1967, p.13. (Views of Mr. Javits). As the Supreme Court has stated, Javits' apparent concern:

> "was that it [the Administration's bill] did not appear to give employers flexibility to hire older employees without incurring extraordinary expenses because of their inclusion in existing retirement plans."

United Air Lines v. McMann, 434 U.S. 192, 199-200 (1978). The floor debates appeared to confirm that understanding. During the 1967 Senate debate, Senator Javits explained that the exception would not require equal benefits for older employees when those benefits were more costly to provide. He stated:

> The meaning of this [§623(f)(2)] provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers, if the older worker chooses to waive all of those provision, then the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension or insurance plan which is not merely a subterfuge to evade the purposes of the act--and we understand that in order to give that older employee employment on the same terms as others.
>
> I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees.

113 Cong.Rec. 31255 (emphasis added). Responding to Senator Javits, Senator Yarborough, majority manager of the ADEA agreed and stated:

> I wish to say to the Senator that this is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan.
>
> * * *
>
> This [§623(f)(2)] will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan. 113 Cong.Rec. 31255 (emphasis added).

Shortly after the passage of the ADEA, the Department of Labor promulgated its first administrative interpretation of §4(f)(2). That interpretation set forth the "equal benefit or equal cost" principle which forms the cornerstone of the current comprehensive Interpretative Bulletin on Employee Benefit Plans. The interpretation stated:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger

> workers, so long as any differential between them is in accordance with the terms of a bona fide benefits plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. §860.120(a)(1969) (emphasis added). The interpretation drew no distinction between pension plans and other insurance benefits and required the expenditure of equal cost on behalf of all participants. The 1969 interpretation remained unchanged through the 1974 statutory amendments and was the operative interpretation at the time of the 1978 amendments to the ADEA.

Congress enacted several amendments to the ADEA in 1978. At the heart of the controversy regarding the 1978 legislative history is a document known as the "Elisburg letter." More than any other segment of the 1978 legislative history, the "Elisburg letter" represents the most definitive support for the current interpretative provisions permitting cessation of pension contributions and crediting at normal retirement age. Due to the importance of the "Elisburg letter," its place in the legislative consideration of the 1978 amendments must be fully understood.

As reported by the House Committee on Education and Labor on July 25, 1977, H.R. 5383 contained several provisions for amendment to the ADEA. The bill proposed to raise the upper level of coverage of the Act from 65 to 70, amend Section 4(f)(2) to include an express prohibition on involuntary retirement, and make several changes to Section 15 as it applied to federal employees. As the accompanying House report indicated, "[t]he primary purpose of H.R. 5383 [was] to reduce the incidence of mandatory retirement for workers in private and State and local employment. . . ." H.Rept. 95-527, 95th Cong. 1st Sess., p.1. Insofar as many mandatory retirement policies were executed pursuant to the terms of existing pension plans, the House Report discussed the impact of the amendments on those existing plans. In so doing, the Report indicated that "[t]his bill would not change the definition of normal retirement age [under ERISA]. These amendments do not require that any additional benefits, benefit accruals or actuarial adjustments be provided other than those required by ERISA." H.Rept. 95-527, 95th Cong., 1st Sess., p.9.

H.R. 5383 was then referred to the Senate Committee on Human Resources for concurrent consideration by both Houses. Senate consideration included a specific written inquiry to the Department of Labor regarding the effects of the amendments on pension plans and employee benefits for employees continuing to work beyond normal retirement age. The request, authored by Senators Williams and Javits, the Chairman and ranking minority members, was dated August 29, 1977, and was sent to Assistant Secretary for Employment Standards, Donald Elisburg at the Department of Labor. On September 13, 1977, the House commenced debates on H.R. 5383. On September 23, 1977, the final day of debates in the House, Assistant Secretary Elisburg's written reply to Senators Williams and Javits was read into the Congressional record. *See* 123 Cong. Rec.H.9977, daily ed., September 23, 1977. That letter, which has since been known as the "Elisburg letter," expressed the opinion that raising the upper level of coverage of the Act would not require any increased pension contributions, crediting, or actuarial adjustments. *Id.* 4/

4/ The complete text of the Elisburg letter is attached hereto as Exhibit G.

On the Senate side, the "Elisburg letter" occupied a more prominent position in the legislative history. The entire text of both the Williams/Javits request and the "Elisburg letter" was printed in the Senate Report from the Committee on Human Resources. See S.Rept. 95-493 95th Cong., 1st Sess., pp.13-16. The letter was cited in the report as justification for the cessation of pension contributions at normal retirement age. The view of pension benefits under Section 4(f)(2) appeared to be facially inconsistent with the Senate's view regarding other benefits after the amendment. As the report stated, "[t]his bill would not alter existing law with respect to these practices. Existing principles of law [equal cost for benefits], including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated." Id. Full Senate consideration of the amended H.R. 5383 began on October 19, 1977, and on that same day H.R. 5383 was referred to conference to resolve differences between the Senate and House revisions. The bill was subsequently reported out of conference on March 19, 1978. The conference report made no specific mention of the "Elisburg letter." Conf.Rept. 95-950, 95th Cong., 2nd Sess., March 14, 1978.

During the passage of the 1978 amendments to the ADEA the reasoning contained in the "Elisburg letter" was repeatedly echoed by the House and Senate leaders who guided the passage of the ADEA amendments. See e.g., 123 Cong. Rec. H9977 (daily ed., Sept. 23, 1977; remarks of Cong. Hawkins), S17274 (daily ed., Oct. 19, 1977; remarks of Sen. Williams), S17276 (daily ed., Oct. 19, 1977; remarks of Sen. Javits). Moreover, when it became clear that the ERISA rules and Elisburg's comments concerning accrual and actuarial adjustment applied only to "defined benefit plans," 5/ these Congressional leaders extended their previous remarks to provide a similar treatment of "defined contribution plans." 6/ All of these remarks purported to be consistent with Section 4(f)(2) of the 1967 ADEA.

The 1978 legislative history is not unambiguous, however. While the matters set forth in the "Elisburg letter" appeared to have been widely embraced by members of both Houses, other remarks, in many instances by the same individuals, specifically endorsed the "equal cost" principle of the 1969 interpretation. For instance, Congressman Hawkins made the following remarks during the floor debates:

> Concerns have been expressed that these amendments will increase the costs of employee welfare benefit plans such as those that provide disability, health, life and other forms of insurance for employees.
>
> Benefits would not have to be equal where there is a legitimate economic or business purpose other than age which justifies the differential in benefits. The purpose of section 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing the benefits to older workers is substantially higher. Any age-based differences in the benefits would have to be evaluated under the standards in section 4(f)(2).

124 Cong.Rec. H2270, (daily ed. March 21, 1978). Congressman Pepper noted:

5/ See 124 Cong. Rec. H2271 (daily ed., March 21, 1978); remarks of Cong. Dent and Hawkins), S4450 (daily ed., March 23, 1978; remarks of Sen. Williams and Javits).

6/ Id.

> For example, employers may offer health and life insurance benefits to older workers that are different from those for other employees. The original reason for this exception was to promote the hiring of older persons. Passage of this act should not be construed by any employer, or any court, to permit the sudden, total and unilateral termination of a capable and healthy worker from a health insurance or other welfare benefit plan solely on the basis of age and without full economic justification.

_Id_. at H. 2275, while Congressman Weiss stated:

> It should be noted that it is not the intention of this amendment to have older workers cut off from their helath and benefit plans the day they reach age 65. While employers, under this section, may not be required to fully integrate older workers into their seniority and pension benefit plans, they should not interpret the 1977 amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees.

_Id_. at 2276. In a similar vein, Congressman Waxman declared:

> I am hopeful, however, that employers do not terminate capable and healthy older workers from benefit plans solely on the basis of age. In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act.

_Id_. at 2277. Relying on the foregoing expressions of Congressional intent, _see_ 44 F.R. 30649, the Department of Labor promulgated the "IB", attempting to harmonize the "equal cost" principle with the principles set forth in the "Elisburg letter." _Id_.

2) A Change in the Current Interpretation Would Conflict with ERISA

A second prominent concern raised by commentors opposed to a change in the "special rules" was that any change would result in "conflicts" with ERISA. This office spent considerable time from November, 1979, through September, 1980, meeting both with staff at the Internal Revenue Service and actuaries in private practice to ensure compatibility of the proposed changes of 1980 with ERISA and the Internal Revenue Code. In fact, a review of ERISA reveals no inherent "conflicts" with the concept of post-normal retirement age pension contributions and there is nothing in ERISA's legislative history which reflects an intent to supplant the ADEA in that area. _See_ Comment 24-14. Indeed, instead of preempting the _pension_ field in the area of age discrimination, ERISA seemed only to confirm what the ADEA had initially proscribed. ERISA's section on minimum participation standards stated:

> (2) No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless -
>
> (A) the plan is a -
>
> (i) defined benefit plan, or
>
> (ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury), and

> (B) such employees begin employment with the employer after they have attained a specified age which is not more than 5 years before the normal retirement age under the plan.

29 U.S.C. §1052(a)(2). That section was in effect in the summer of 1977 at the start of debates over the amendments to the ADEA. There had not yet been any administrative regulations or Revenue Rulings issued by either the Internal Revenue Service or the Department of Labor regarding post-normal retirement age pension benefits. Notwithstanding the absence of any formal administrative guidance on the issue, on July 26, 1977, Donald E. Elisburg responded in the following manner to Senator Jacob Javits in Senate hearings on the ADEA:

> Mr. Elisburg. Our understanding, Senator, is that under ERISA, once an individual reaches normal retirement age as defined in that act, the plan may cut off the individuals' build-up, or accrual of benefited amounts. Under section 4(f)(2) of the ADEA this practice would still be permitted, and a build-up of benefit amounts could continue to be terminated at a certain age.
>
> Senator Javits. So that an employer will not necessarily be raising the accrued benefit?
>
> Mr. Elisburg. That is correct.

Age Discrimination in Employment Act Amendments of 1977: Hearings on S.1784 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 72 (1977).

After Elisburg's assurances during the Senate hearings and before the "Elisburg letter," the Department of the Treasury issued regulations which appeared to corroborate his testimony. Those regulations, published on August 23, 1977, are as follows:

> (f) Suspension of benefits, etc. - (1) Suspensions. No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203 (a)(3)(B) of the Employee Retirement Income Security Act of 1974 (88 Stat. 855) (Code section 411(a)(3)(B)).
>
> (2) Employment after retirement. No actuarial adjustment to an accrued benefit is required on account of employment after normal retirement age. For example, if a plan with a normal retirement age of 65 provides a benefit of $400 a month payable at age 65 the same $400 benefit (with no upward adjustment) could be paid to an employee who retires at age 68.

26 C.F.R. §1.411(c)(f)(2). In his September 8, 1977 letter, Elisburg relied upon the IRS regulations published two weeks earlier. One commentor responding to the Commission's Request for Comments characterized the entire sequence of events as "highly irregular", noting that the regulations upon which Elisburg relied had not appeared in IRS's notice of proposed rulemaking, see 40 F.R. 51445, 51464 (Nov. 5, 1975), and that when added to appear in the final regulations, no explanation was given except that Section 1.411 (c)-1 was being changed "by adding a new paragraph (f)." 42 F.R. at 42320; See Comment 24 at 16.

Still later, in December of 1978, the Department of Labor proposed regulations regarding the suspension of benefits under Section 203(a)(3)(B) of ERISA. 43 F.R. 59048. Those regulations set forth in substantial detail the circumstances under which an employer may permissibly suspend the payment of pension benefits during employment beyond the normal retirement age. Finalized on January 27, 1981, the regulations provide that pension benefits may be suspended during post-normal retirement age employment "to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. §2530.203-3(a). 7/ As the preamble to those regulations made clear, however, neither Section 203(a)(3)(B) of ERISA nor the regulation "require plans to provide for or impose suspension of benefits." 46 F.R. 8894. (emphasis added).

The argument that a change in the "special rules" would create a conflict with ERISA is not legally supported. First, absent a clearly expressed intention to the contrary, courts and administrative agencies are obligated to regard both the ADEA and ERISA as effective. See Morton v. Mancari, 417 U.S. 535, 551 (1974); Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981). Moreover, statutory or regulatory provisions are not in conflict unless they are "irreconcilable and establish a positive repugnancy." See Sutherland, Statutory Construction, §23.10; Regional Rail Reorganization Cases, 419 U.S. 102, 133-134 (1974). An administrative interpretation under the ADEA which required post-normal retirement age pension contributions and credit would create no positive repugnancy either with the Internal Revenue Code or ERISA. The IRS provisions, 29 C.F.R. §1.411(c)(f)(2), are permissive in nature and, in effect, assure that a plan which discontinues pension contribution and crediting will not lose its favored tax treatment under the Internal Revenue Code.

Legal arguments aside, however, the most compelling support for the conclusion that requiring post-NRA contributions does not conflict with ERISA is current employer practice. Approximately 42% of medium and large employers currently credit post-NRA service in their benefit formulas, 8/ and more than 50% of all plans provide for some type of adjustments, either actuarial or service credits, for work beyond the NRA. 9/ As a general rule, credit or contributions for post-NRA employment occur with even greater frequency in defined contribution plans. 10/ In addition, during informal coordination with the Internal Revenue Service under E.O. 12067 between October 1979 and September, 1980, this office was repeatedly assured that a requirement of post-NRA contributions would not run afoul of Internal Revenue Code provisions regarding the tax status of pension plans.

3) A Change in the Current Interpretation Would Impose Additional Costs on Employers

Since the commencement of the Commission's review of the "special rules" in 1979, objections have been raised to any proposed changes in those rules on the grounds that they would impose substantial additional costs on employers. On the other hand, civil rights advocates and ADEA interest groups have long argued, with equal resolve, that a change in the "special rules" would not result in additional employer costs. There are two distinct and severable facets of the cost analysis, each of which has as its cornerstone a truism advanced by those diametrically opposed advocates.

7/ As one commentor argued, the only truly consistent reading of both IRS and ERISA regulations "is that the value of the suspended benefits must be paid at the conclusion of the permissible suspension period, with an actuarial adjustment." See Comment 24 at 14. As written, DOL's "special rules" do not require an actuarial adjustment to reflect postponed retirement. 29 C.F.R. §860.120 (f)(iv)(1)(B)(4).

8/ "Employee Benefits in Medium and Large Firms, 1982," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2176 (August 1983) at 44.

9/ Pension and Welfare Benefits for Older Workers: The Preliminary Impact of the ADEA Amendments, Aging and Work, Spring 1980, 79-81.

10/ Id.

Employers have long argued that changes in the "special rules" would result in increases in "absolute" pension costs. That appears indisputably correct. Similarly, civil rights advocates have long argued that post-NRA pension credits are no more costly than those same credits for younger workers.

Defined benefit plans are designed to provide a projected monthly income at the normal retirement age specified in the plan, most often age 65. While there are a variety of formulas used for computing retirement benefits, the variables most frequently used in benefit formulas include average salary (over a career or a fixed period of years), final pay, and/or years of service. These variables are often combined in a formula which includes a set percentage, the product of which is the projected retirement benefit. The projected benefit at the normal retirement age, either monthly or annually, multiplied by the projected life span of the recipient would produce an amount that constituted the actuarial present value of the benefit at normal retirement age, "APV." "APV" is critical in the funding of pension plans because it represents the amount collectible, at intervals, at the date of retirement. For that reason, actuaries use APV to determine the appropriate funding level of the plan.

As it relates to the controversy at hand, the APV at normal retirement age is different than the APV of a postponed retirement benefit. The difference in value depends on whether an employer provides credits for service and salary increases which occur beyond the normal retirement age.

Under the provisions of the "IB", an employer is required to do neither, nor is an employer required to provide an actuarial adjustment to reflect postponed retirement. By definition, an actuarial adjustment increases the periodic pension payments so that the APV of the normal retirement benefit at normal retirement age is identical to the APV value of the benefit at postponed retirement. Using the actuarial present value as a basis for analysis, we find the following results from the current "special rules":

1. Employers who "freeze" benefits at the normal retirement age, i.e., make no actuarial adjustments and credit neither service nor salary increases realize a decrease in the actuarial present value of the benefit of approximately 10-12% per year during the period of deferred retirement. See Comment 25 at 7. 11/

2. In those cases in which only additional service is credited, the actuarial present value of the benefit decreases at approximately 7-10% per year. Id.

3. If both additional service and salary increases are credited, then the actuarial present value of the benefit declines at a rate of 2-4% per year. Id.

4. If an actuarial adjustment is made, there is no increase or decrease in the actuarial present value of the benefit. Id.

5. If an employer provides an actuarial adjustment and credits service and salary increases beyond the NRA, the actuarial present value of the benefit will grow at a rate of approximately 8-12% for each year of deferral. Id.

11/ These figures were provided by the American Academy of Actuaries and were extracted from Comment 25.

Clearly, an employer who, consistent with the "special rules," provides no actuarial adjustment for postponed retirement will experience a 2-12% decrease in the actuarial present value of the pensions he is obligated to pay for each year of post-NRA employment. That decrease in the actuarial present value of pension obligations is, in effect, a source of considerable income to employers. Depending on the funding assumptions used in the plan, the income is realized in one of two ways.

Due to the conservative nature of the actuarial profession, actuaries are generally reluctant to assume that employees will retire at ages later than normal retirement age. For that reason, most plans proceed on funding assumptions that individuals will retire and commence the receipt of their pension benefits at normal retirement age. A fortiori, plans are adequately funded to make the appropriate payments. When an employee works beyond the NRA, the plan need not make those anticipated payments until actual retirement. Each payment which was anticipated but never made immediately is transformed from an obligation to an asset of the plan. 12/ This is, indeed, the "windfall" long since identified as a consequence of the "special rules", see Exhibit B at 6, and it is at the same time the "cost" which employers would "incur" if the special rules were changed.

Alternatively, some plans have an established history of a significant proportion of employees working beyond the normal retirement age. Those plans integrate assumptions into their funding which reflect the decreasing actuarial present value of the pensions that results from the operation of the "special rules." For those plans, a change in the special rules would require the elimination of those reduced funding assumptions, thereby increasing employer funding cost. Here again, the employer "cost" which would be incurred is more appropriately recognized as the elimination of the decreased actuarial present value of the pension. In either event, elimination of the "windfall" approximates the "cost" to the employer. For that reason, employer estimates regarding the "cost" of changing the special rules are also accurate indications of the actuarial present value of pension benefits lost by employees who work beyond the NRA.

Pension contributions and crediting for employees who work beyond the normal retirement are not more expensive to provide than those same contributions to younger workers. That is the conclusion reached by noted actuary Anna M. Rappaport in her information paper prepared for the Select Committee on Aging. See Rappaport, A., An analysis of the Costs of Pension Accrual After Age 65, Select Committee on Aging, No. 97-323, May 1982. 13/ That paper and the document prepared by the American Academy of Actuaries, Comment 25, both indicate that an employer who credits years of service and salary increases for post-NRA employment will still benefit from a decrease in the actuarial present value of the funded benefit of 2-4% per year of continued employment. See Comment 25 at 7; Comment 26, Attachment at VII. Thus, while the Rappaport study indicates that crediting service and salary increases for work beyond NRA is no more

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12/ For example, assume that an employee who at age 65 was entitled to a $500 per month pension benefit continued employment through age 70. The funded benefits of $6,000 per year would never be paid and would substantially decrease the employer's funding obligation in future years.

13/ The Rappaport paper was submitted by the Senate Select Committee on Aging urging a change in the "special rules". See Attachment to Comment 26.

expensive than for younger workers, when read together with the submission of the American Academy of Actuaries, those documents indicate that pension credits for employment beyond the NRA would be less expensive to provide and would still be accompanied by an employer "windfall" of 2-4% per year.

C. STATISTICAL DATA

Although the September 15, 1983, Federal Register notice requested statistical and technical data regarding the operation of pension plans, only 5 of the 33 commentors provided statistical data. 14/ In general, this information was too sparse from which to draw any meaningful inferences. Nevertheless, some of the information available provides a helpful background for consideration of the issue of post-NRA pension contributions and will be briefly summarized below.

Approximately 44.7 million employees are currently active participants in private pension plans. Approximately 70% of all those participants are covered by defined benefit plans, which are only about 28% of the total number of private pension plans. 15/ The normal retirement ages specified in pension plans is most often age 65 (42%). However, normal retirement ages of 62 (19%), 60(10%), and 30 years of service at any age (13%) are not uncommon. 16/

Generally speaking between 42 and 58% of all private employers do not provide crediting and contributions for work beyond the normal retirement age, and this percentage does not vary significantly with organizational size or standard industrial classification. 17/

Defined contribution plans (60%) and profit sharing plans (69%) are more likely to provide for further accruals than defined benefit plans (48%). For firms with 20-99 employees, the provision for accruals for older workers is not significantly related to type of plan offered. That relationship is stronger for larger employers, firms with 100 to 499 employees and with 500 or more employees. Generally, as the size of the firm increases, the percentages of employers providing pension benefit accruals in defined benefit plans declines (to 38%), 18/ while it increases in defined contribution plans (to 69%). This information was obtained from a survey of 808 employers covering 275,337 employees.

14/ Comments 20, 21, 27, 29 and 30 provided statistical data to varying degrees.

15/ "Estimates of Participant and Financial Characteristics of Private Pension Plans," U.S. Department of Labor, Labor-Management Services Administration, Pension and Welfare Benefits Program (1983), cited in Comment 27 at 27-12.

16/ "Employee Benefits in Medium and Large Firms, 1982," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2176 (August 1983).

17/ See Rappaport, A and Copperman, L. Pension and Welfare Benefits for Older Workers: The Preliminary Impact of the ADEA Amendments, Aging and Work, Spring 1980. See also Comment 27 at 27-13.

18/ In one survey, employers asked to provide a rationale for the cessation of pension crediting responded that the purpose was to "discourage employment beyond age 65 through freezing benefits." See Johnson & Higgins, A Survey on the Effects of the 1978 Amendments to the Age Discrimination in Employment Act, p. 25.

As of 1981, 12.2% of persons aged 65 and older were in the civilian Labor force, approximately 3,030,000 workers. 19/ That number is approximately 2.7% of the total labor force (age 16 and over). 20/

III. THE STATUS OF THE "SPECIAL RULES"

No portion of the Department of Labor's Interpretative Bulletin on Employee Benefit Plans has ever been formally adopted by the Commission. Just two days prior to the transfer of ADEA Authority from DOL, the Commission published a transitional notice in the Federal Register which continued in effect all existing interpretations and opinions of the Department of Labor. See 44 F.R. 37974 (June 29, 1979). The purpose of that transitional notice was to allow the Commission sufficient time to accomplish a "complete review of the [DOL] Interpretations (29 C.F.R. Part 860) and Opinion letters issued by the Wage and Hour Administrator. . . ." 44 F.R. at 37974. While not embracing the existing guidance, the Commission's notice indicated that all current interpretations "remain in effect and may be relied upon as provided by section 7(e)(1) of the [ADEA]." 44 F.R. at 37975.

On November 30, 1979, the Commission published proposed interpretations of the ADEA for notice and comment. 44 F.R. 68858. That publication made no mention of ongoing Commission review of the "IB," but reserved §1625.10 for "Costs and benefits under Employee Benefit Plans" and referred the reader to the existing "IB". 44 F.R. at 68860. When final ADEA regulations were published almost two years later, 46 F.R. 47726, the Commission made specific mention of its ongoing review of the "IB" and its intentions to publish any proposed modifications to that document for notice and comment in the Federal Register. See supra at 1a, n.1.

Thus, by virtue of the transitional notice of June 29, 1979, and subsequent publications, the Commission has continued the "special rules" in effect for almost five years, while neither affirmatively adopting nor rejecting them. Employers continue to be provided a good faith defense to actions by employees challenging the legality of practices permitted by the rules, while employees have continued to contend unsuccessfully that the rules, which work to their detriment, are contrary to the ADEA. 21/

IV. LEGAL CONSIDERATIONS IN THE CURRENT REVIEW

In addition to having an inherent right to interpret the statute which it administers, see Skidmore v. Swift, 323 U.S. 134, 140 (1944), under the ADEA the Commission has substantive rulemaking authority. 29 U.S.C. §628. The combination of interpretative and rulemaking authority

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19/ "Employment and Training Report of the President," U.S. Department of Labor, Office of Strategic Planning and Policy Development, at 151, 154 (1982).

20/ "Employment and Earnings," U.S. Department of Labor, Bureau of Labor Statistics, at 144-5 (January 1983).

21/ See Von Aulock et al. v. Smith, 33 FEP Cases 3; 32 EPD ¶33,870 (D.C. Cir. 1983) (employee suit dismissed on grounds of lack of standing); cf. Farmer's Group, Inc. v. Donovon et al., No. 80-2110 (D.C. Cir. 1981) (unpublished decision) (employer suit challenging other provision of the "special rules" dismissed on grounds of lack of standing).

provides the Commission with considerable latitude in addressing the validity of the "special rules." Interpretative rules are not binding on a court but are accorded deference consistent with the standards first enunciated in Skidmore v. Swift, supra. In contrast, substantive rules are binding on a court and are reviewable only under an arbitrary and capricious standard. See Joseph v. Civil Service Commission, 554 F.2d 1140, 1154, n.26 (D.C. Cir. 1977). These differences are especially relevant to any discussion regarding potential changes in the "special rules." A change affected by way of an interpretation would not bind a court and would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements. . . ." Skidmore v. Swift, 323 U.S. at 140. Conversely, a change affected by a substantive rule would be reviewed under the more limited "arbitrary and capricious" standard.

The duration of Commission review of the "special rules" and their consequent continuation pose no special impediments to their modification. That an agency has an inherent right to modify or reverse its course was eloquently stated by Judge Wright in Columbia Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018 (D.C. Cir. 1971). In discussing inconsistent FCC interpretations which had a bearing on the issue of the case, the Court said:

> We do not challenge the Commission's well established right to modify or even overrule an established precedent or approach, for an administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to its prior rulings. Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law. (footnotes omitted).

Columbia Broadcasting System, Inc. v. FCC, 454 F.2d at 1026. This approach is entirely consistent with other cases in this area. Those cases make it clear that an agency must be given flexibility to reexamine and reinterpret its previous holdings, but that in so doing it must clearly indicate and explain its action so as to enable completion of the task of judicial review. Atchison, Topeka & Sante Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 806-09, (1973); Office of Communication of United Church of Christ v. F.C.C., 560 F.2d 529, 532-3 (2d Cir. 1977). When, as here, the agency position would constitute a departure from prior standards, the agency must first give notice that the standard is to be changed, Boston Edison Co. v. FPC 557 F.2d 845, 849 (D.C. Cir. 1977), must provide a thorough and comprehensive statement of reasons for the change, Atchison, Topeka & Sante Fe Railway v. Wichita Board of Trade, supra.; Office of Communication of United Church of Christ v. FCC, supra.;

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) cert. denied 403 U.S. 923 (1971), and must discuss the past precedent, Marine Space Enclosures, Inc. v. Federal Maritime Comm., 420 F.2d 577, 585 (D.C. Cir. 1969).

The foregoing legal principles should be kept in mind in consideration of the following options. At this stage, adoption of the "special rules" could be accomplished by an appropriate notice published in the Federal Register. Conversely, a change in the "special rules" either by interpretation or substantive rule would be published for notice and comment, thereby giving notice to the public that the standard is to be changed. See Boston Edison Co. v. FPC, 557 F.2d at 849. A change affected by a substantive rule would be less likely to be overturned during judicial review than an interpretation.

THE COMMISSION'S ALTERNATIVES 22/

ALTERNATIVE ONE Adopt The Existing "Special Rules."

This alternative involves the complete adoption of the "special rules" which permit employers to cease pension contributions and crediting at normal retirement age. See 29 C.F.R. §860.120 (f)(1)(iv)(B)(1)-(7). Insofar as the adoption of this alternative would maintain the status quo, there would be no need for the Commission to publish the "IB" for notice and comment under this alternative. The Interpretative Bulletin would be renumbered to appear at 29 C.F.R. §1625.10 and would be adopted upon publication in the Federal Register.

Advantages -

1. This approach would give controlling weight to the disputed 1978 legislative history and to the "Elisburg letter." The letter itself was read into the Congressional record during both the House and Senate consideration of the ADEA amendments, and was published as part of the Senate report. Thus, the 1978 amendments were passed with an advance understanding of the manner in which they would be interpreted by the Department of Labor. Adoption of the "special rules" would give continued vitality to the understanding Congress had when it promulgated the 1978 amendments.

2. To the extent that the current "special rules" provide highly favorable financial benefits to employers, their adoption would be welcomed by the business community. Absent a change in the "special rules," it would be unlikely that OMB would have objections to their adoption.

3. Insofar as adoption of the existing "special rules" would represent a continuation of the status quo, there would be no need to publish the interpretations for notice and comment in the Federal Register. The adoption would be effective upon publication.

Disadvantages -

1. The existing controversial provisions of the "IB" act as strong disincentives to the continued employment of the elderly despite their legal right to that employment. 23/ The provisions of the "IB" permit an employer to literally "freeze" an employee's pension entitlement at normal retirement age. The employee receives no pension credit for subsequent years of service nor does the ultimate pension at actual retirement reflect the employee's shortened lifespan. The latter result, permitted by the "IB" provision which does not require an actuarial adjustment, provides an employer with a recognized and substantial monetary windfall. In essence, an employer is permitted to retain all those funded pension benefits which it normally would

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22/ Each of the alternatives provides for the adoption of those provisions of the "IB" dealing with non-pension benefits. For that reason, the following analysis focuses only on the advantages and disadvantages of alternatives regarding the post-normal retirement age pension issue as represented by the "special rules."

23/ Even prior to the approximately 650 comments received by employees and considered in the current review, the Commission had received in excess of two hundred letters from employees urging a change in the status quo.

have paid to an employee who retired at normal retirement age. See Exhibit B, pp. 5-6 and p.5 infra.

2. Formal adoption of the controversial provisions of the "IB" would effectively deprive all employees of the right of independently pursue claims on this controversial issue of employment discrimination. While purporting to be a non-binding "interpretation" of the ADEA, a Commission interpretation including the controversial provisions would create a "good faith defense" under Section 7(e)(1) of the ADEA, 29 U.S.C. §626(e)(1), which incorportates Section 10 of the Portal-to-Portal Act. Such a good faith defense completely immunizes an employer from back wage liability under the ADEA. Thus, an employee could independently sue his or her employer for the refusal to make pension contributions, prove the agency interpretation in error, and still not recover any back wage liability. This result is particularly significant in light of the fact that one court of appeals decision has already denied employee plaintiffs the ability to sue the Commission for a declaratory judgment on the issue. 24/

3. The information paper prepared by Anna Rappaport, Vice President of William M. Mercer, Inc., for the House Select Committee on Aging concludes that pension costs for employees beyond normal retirement age would be no greater than costs incurred for younger employees. As Congressman Claude Pepper stated in his prefatory remarks to the published study:

> The message of this study is clear: There is no validity to the argument that pension accruals for work after age 65 will cost companies more than pension accruals for workers age 60-64. The cost rationale which has supported the current ADEA exemption does not correlate with the evidence. See Rappaport, A., An Analysis of the Costs of Pension Accrual after age 65, Select Committee on Aging, 97th Cong., 2d Sess., Comm. Pub. No. 97-323, p. VIII (1982).

Arguably, therefore, the "special rules" are at odds with the purpose of Section 4(f)(2) expressed in the 1967 legislative history of accommodating those benefit practices which were more expensive vis-a-vis older workers.

4. The principal legal argument against the "special rules" is that they are based on observations of the requirements of Section 4 (f)(2) of the ADEA which were made more than ten years after the passage of the Act. In different contexts, two different Supreme Court cases have already held that "legislative observations 10 years after the passage of the Act [ADEA] are in no sense part of the legislative history." United Air Lines v. McMann, 434 U.S. 192, 200 n.7 (1977); Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). These cases are arguably applicable to the controversy at hand because while the 1978 observations pertained to the requirements of pension plans under Section 4(f)(2) of the ADEA, that provision of the statute was not materially amended in 1978 except with

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24/ See Von Aulock, et al. v. Smith, supra n.21.

respect to involuntary retirement. Under the McMann rationale, therefore, the 1978 observations should be disregarded in favor of the 1967 legislative history. 25/ Adoption of the "special rules" would disregard this critical legal argument.

B. ALTERNATIVE TWO - Adopt the "Special Rules" as they apply to defined benefit plans; Rescind the "Special Rules" as they apply to defined contribution plans.

The principal characteristic of this option is that it draws a distinction between defined benefit and defined contribution plans. Defined benefit plans are funded on the complex actuarial assumptions referenced earlier at pages 20 thru 23. In contrast, defined contribution plans operate more in the nature of savings plans. Individual accounts are maintained for each participating employee, the balance of which is paid to the employee at retirement either in a lump sum or in an annuity. These elementary differences make defined contribution plans much more predictable in terms of cost to the employer. Periodic contributions are made on behalf of all participants regardless of age. It is exactly these differences that were implicitly recognized in the "Elisburg letter." The terminology used in the "Elisburg letter" indicates it was referring to defined benefit plans, not defined contribution plans. For that reason, the Commission could distinguish between the two types of plans, relying on the limitations implicitly set forth in the "Elisburg Letter."

In addition, this option would provide for the rescission of the current "special rule" which allows employers to deny benefit improvements to employees working beyond the NRA. 29 C.F.R. §860.120(f)(1)(iv)(B)(7). Neither the "Elisburg letter" nor the accompanying 1978 legislative history makes any specific reference to benefit improvements. Nonetheless, the provision allowing employers to deny benefit improvements appeared in the "IB" along with the other "special rules." We suspect that the rationale behind this provision is that it is consistent with the other "special rules" which, in general, permit an employer to treat individuals working beyond the NRA as if they had retired at least for the purposes of pension plan administration.

ADVANTAGES -

1. There appears to be no cost basis for the denial of contributions to older workers in defined contribution plans. For that reason, the rescission of the special rules as they apply to defined contribution plans would be consistent with the equal cost principle set forth in the Interpretative Bulletin.

25/ Prior to 1978, as now, many pension and retirement plans had normal retirement ages ranging from 60 to 65. Thus, even prior to the 1978 amendments extending coverage of the Act, post-normal retirement age employees were covered by the ADEA. Presumably, the issue of their right to continued pension contributions would have been resolved in accordance with the statute (Section 4(f)(2)), its legislative history, and existing agency interpretations. As the Clark memorandum pointed out, Section 4(f)(2) and its legialative history were unaffected by the 1978 amendments. Insofar as the earlier DOL interpretation (1969) contained no "special rule" for covered employees working beyond normal retirement age, the "special rules" represented a substantial change in position. Arguably, that change in position was based exclusively on non-binding legislative observations which the DOL, in fact, had supplied in the form of the "Elisburg letter." See Exhibit A, pp. 5-9.

2. Since it appears clear that the "Elisburg letter" concerned only defined benefit plans, this option would continue to accord deference to the letter as a viable part of the legislative history while at the same time limiting its scope to the language of the letter itself.

DISADVANTAGES -

1. By necessity, this option requires that the "Elisburg letter" be given a prominent place in the legislative history. In so doing, however, the Commission would be required to explain other portions of the legislative history. Specifically, when it became apparent that the "Elisburg letter" did not apply to defined contribution plans, several congressmen injected remarks into the congressional record attempting to correct that deficiency. In adopting this option, the Commission would be required to explain why the "Elisburg letter" was entitled to deference and the statements of the legislators were not.

2. Pursuit of this option would precipitate objections from the employer community and from OMB based on the claim that the newly required contributions would impose additional costs on employers.

3. Employers operating defined contribution plans would also object on the grounds that they were being treated differently simply because of the type of pension plan that they sponsored. No doubt some employers will argue that the Commission action encourages employers to discontinue defined contribution plans in favor of defined benefit plans.

C. ALTERNATIVE THREE- Rescind The Special Rules

This alternative involves the rescission of the "special rules" which permit employers to cease pension contributions and crediting at normal retirement age. *See* 29 C.F.R. §860.120 (f)(iv)(1)(B)(1)-(7). Since the "special rules" are currently in effect by virtue of prior Commission notices, *see* 44 F.R. 39794 (June 29, 1979); 46 F.R. 47724 (Sept. 29, 1981), their rescission would constitute a change in position requiring formal notice and comment procedures. The most tangible effects of such a rescission would be to eliminate the absolute defense that employers currently have by virtue of the "special rules" and to facilitate judicial review of the issue of post-normal retirement age pension contributions under the ADEA. To accomplish this alternative, a document would have to be prepared for *Federal Register* publication.

Advantages -

1. The withdrawal of the "special rules" would eliminate the existing good faith defense that employers currently have by relying on the existing interpretative provisions. As a consequence of the existing provisions, employees are currently unable to recover any back wage liability even if they prevail in court. Rescission of the "special rules" would provide an economic incentive for an employee to pursue his claim independently.

2. At least several hundred letters from older workers have been received by the agency regarding the lack of incentives to work beyond normal retirement age. As this correspondence points out, many employees encounter a "Catch-22" situation at normal retirement age. That is, their pensions are insufficient to support retirement but cannot be enhanced by continued employment. The rescission of the "special rules" would probably cause some employers to modify current practices, thereby making continued employment a more viable option.

3. Moreover, the absence of interpretative guidance would not prohibit an employer from continuing to cease pension contributions and crediting at normal retirement age. For those reasons, the Commission would be in a strong position to argue to OMB that the rescission of the "special rules" had no significant economic impact necessitating a regulatory impact analysis under Executive Order 12291. OMB objections to rescission would have to be premised on some argument that the Commission was obligated to interpret the ADEA in the current manner.

4. In rescinding the "special rules", the Commission need not attempt to resolve the issue of whether post-normal retirement age pension contributions are required under the ADEA. Indeed, the Commission could conclude that in light of the existing controversy the best course of action is to eliminate the good faith defense and permit the issue to be resolved either by the Courts or by the Congress.

Disadvantages -

1. To the extent that the "special rules" were rescinded and not replaced with new provisions requiring continued contributions and crediting, there would be a lack of specific agency guidance in this area as requested by Congress in the legislative history of the 1978 Amendments.

2. The Commission could anticipate strong objections to the rescission of the "special rules."

D. ALTERNATIVE FOUR - Rescind And Replace the "Special Rules" with Interpretations or Substantive Rules requiring continued contributions and crediting for Post-NRA employment

This alternative involves the proposed rescission and modification of the "special rules" which permit employers to discontinue pension contributions and crediting at NRA. 29 C.F.R. §860.120(f)(iv)(1)(B)(1)-(7). This proposal differs from alternative three to the extent that the special rules are replaced by a comprehensive set of interpretations which require continued pension contributions. As noted earlier, see infra 27-28, this could be accomplished either by proposed interpretations or substantive rules. Moreover, the proposed modifications could require (1) an actuarial adjustment for postponed retirement, (2) service credits for work beyond the NRA, (3) credit for salary increases which occur beyond the NRA, or (4) any combination of the foregoing. The following discussion of the advantages and disadvantages of any proposed changes will attempt to delimit the specific advantages of each of these choices.

Advantages -

1. As with the third option, the withdrawal of the "special rules" would eliminate the existing good faith defense that employers have in relying on the existing provisions.

2. The advantage of requiring an actuarial adjustment to reflect postponed retirement is that, by definition, an actuarial adjustment would ensure that employees retiring beyond the NRA would suffer no reduction in the actuarial presnet value of their pensions. This would substantially eliminate the existing disincentive to work beyond NRA.

3. Requiring credit for service and salary increases (Parts 2 and 3) which occur beyond NRA would also substantially eliminate the disincentive to continued employment. Implementation of this option would ensure similarity of treatment with younger employees. In addition, as explained in detail earlier, this option would still result in a 2-4% per year decline in the actuarial present value of the pension benefits. Employers would, thereby, still receive a substantial monetary "windfall" from postponed retirement.

4. The combination of an actuarial adjustment and credit for service and salary increases beyond the NRA would provide full protection for employees who continue to exercise their legal right to work. In the truest sense, this option would allow an employee to increase the actuarial present value of his pension through continued employment.

5. Implementation of these options would be based on a rejection of the Elisburg letter as controlling on this matter. Such an approach appears consistent with the Supreme Court's view in the McMann and Oscar Mayer cases, and would explicitly embrace the "equal costs or equal benefit" principle of the original 1969 DOL interpretation.

Disadvantages -

1. The proposal would be contrary to the "Elisburg letter" and the congressional intent as expressed therein.

2. To varying degrees, credit for post-NRA service and salary increases or an actuarial adjustment would increase employer costs.

3. The Commission could anticipate strong objections to the new rules.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUN - 5 1984

MEMORANDUM

TO : The Commissioners

FROM : Constance L. Dupre CLD
Legal Counsel

SUBJECT : Public Comments in Response to the Commission's Federal Register Notice of September 15, 1983, regarding Pension Benefits at Normal Retirement Age

This memorandum is intended to supplement our memorandum of April 30, 1984 on the referenced subject to include an additional point under Option B. See page 31. Option B gives effect to the 1978 legislative history to the ADEA, but limits that effect to the specific types of pension plans and matters referenced in the "Elisburg letter." This letter is the crucial part of the legislative history and forms the chief support for the "special rules." Thus, insofar as the Elisburg letter refers only to defined benefit plans, the option would adopt the "special rules" as they pertain to those plans, but rescind the "special rules" as they apply to defined contribution plans, i.e. those types of plans not referenced in the "Elisburg letter." In addition, the provision in the "Special Rules" permitting the exclusion of workers aged 65 to 70 from benefit plan improvements is also rescinded as it is not mentioned in the "Elisburg letter" or otherwise supported generally in the legislative history. In effect, Option B applies a restrictive reading to the 1978 legislative history and gives effect only to those principles which appear with clarity and precision.

In a similar fashion, the Commission could adopt the "special rules" or any parts thereof and limit their effect to employees aged 65 through 69. Thus, employers maintaining a retirement age of less than 65 would continue to make pension contributions until the employee turned 65. This would be consistent with the 1978 legislative intent regarding post-normal retirement age contributions and would be a proper limitation on the 1978 legislative history since the Elisburg remarks were precipitated by the change in the upper level of coverage of the Act from 65 to 70. In addition to the advantages and disadvantages discussed at pages 31 and 32 of our April 30, 1984, memorandum, restricting the impact of the 1978 legislative history to employees aged 65 through 69 would have the disadvantage of requiring two standards of conduct for post-normal retirement age service under Section 4(f)(2) while the language of that section makes no differentiation between the two. In addition, employers could easily avoid such a provision by changing the normal retirement age to age 65 and altering the plan slightly to reduce the employer's yearly contribution, and thus avoid having to make additional pension contributions.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

REPORT OF MEETING

By: Andrelia C. James
Office of Executive Secretariat

Commission Meeting - June 26, 1984 - Open - 9:36 AM.

Commissioners Present:	Clarence Thomas, Chairman Tony Gallegos, Commissioner William Webb, Commissioner Fred Alvarez, Commissioner

(A) Freedom of Information Act Appeals

Commissioner Webb moved the following for consideration.
Commissioner Gallegos seconded the motion.

—Freedom of Information Act Appeal No. 84-04-FOIA-06-AT
—Freedom of Information Act Appeal No. 84-4-FOIA-76-CL
—Freedom of Information Act Appeal No. 84-4-FOIA-67-CL
—Freedom of Information Act Appeal No. 84-04-FOIA-46-HU

By a vote of 4 to 0, the Commission voted, en bloc, to approve the FOIAs.

Voting in the affirmative: Chairman Thomas, Commissioner Gallegos, Commissioner Webb, Commissioner Alvarez

(B) Proposed Qualification Criteria for EEOC's Tribal Employment Rights Office (TERO) Program

Commissioner Webb moved the item for discussion.
Commissioner Gallegos seconded the motion.

Commissioner Gallegos inquired about the status of the pending IPA (Intergovernmental Personnel Act) assignment. Ronnie Blumenthal, Office of Program Operations, advised that interviews have begun and the assignee is expected to be on board by October 1, 1984.

Commissioner Gallegos noted that several tribal organizations have expressed concern over the Commission's services in the urban areas. Blumenthal stated that this would be one of the areas that the IPA assignee would explore.

Commissioner Webb recommended the following editorial change under the section entitled "Procedures", subsection "Reporting," 5th paragraph, 1st line, change the word "must" to "may", so that the sentence would read:

> "The TERO may submit all required reports within the prescribed reporting schedules."

By a vote of 4 to 0, the Commission approved the proposal.

Voting in the affirmative: Chairman Thomas, Commissioner Gallegos, Commissioner Webb, Commissioner Alvarez

(C) Proposed Apprenticeship Program Regulation

Commissioner Webb moved the item for discussion.
Commissioner Gallegos seconded the motion.

J. Pagano, Office of Legal Services, presented the notice of proposed rulemaking which provides that apprenticeship programs are covered by the Age Discrimination in Employment Act. This undertaking followed a decision in the Federal District Court case of Quinn v. New York State Electrial and Gas Corporation, where the court upheld the previous interpretation that apprenticeship programs are not covered by ADEA.

The proposed notice has been thru SCEP and interagency coordination. Pagano noted DOL's opposition which is indicated in the preamble of the proposed notice.

Commissioner Webb asked if it is customary to undertake actions after winning only one court decision. Pagano responded in the negative, stating that because it was previously submitted to the Commission and circulated for comment, the Offices of General and Legal Counsel recommended a review of the regulation.

In response to a question by Chairman Thomas regarding the impact of the decision, Pagano stated that an action in favor of the notice would alleviate the General Counsel being placed in the position of defending the existing interpretation.

Chairman Thomas asked why it was not accepted in the past. Pagano responded that the primary concern was that the inclusion of apprenticeship programs under the Act could have an adverse impact on those apprenticeship programs that are targeted at specific minority groups having high unemployment rates. He added that the Offices of Legal and General Counsel have taken the position that the Section IX authority to grant exemptions from any of the provisions of the Act could be a means for exempting any apprenticeship program that is targeted at specific minority groups for the purpose of promoting employment.

By a vote of 4 to 0, the Commission approved the rulemaking.

Voting in the affirmative: Chairman Thomas, Commissioner Gallegos, Commissioner Webb, Commissioner Alvarez

(D) Equal Pay Act (EPA) Opinion Letter Procedures

J. Pagano, Office of Legal Counsel, presented the proposed procedures for processing requests for opinion letters under the Equal Pay Act.

Commissioner Gallegos asked that the procedures be explained. Pagano responded that under the proposed procedures, if an "informal opinion" letter is issued, an explanation memorandum recommending against the issuance of a "formal opinion," a copy of the incoming corresponsence, and the proposed response will be provided to the Commissioners for review on a 72-hour hold basis. Under these procedures, if a Commissioner should place a "hold" on it, the Office of Legal Counsel would attempt to resolve the matter informally. If not, the Office of Legal Services would schedule it for discussion at the next available SCEP meeting. In the event that it is not resolved at that stage, it would then be placed on the agenda for consideration at a duly constituted Commission meeting.

Commissioner Webb stated that it would be difficult to make a credible argument in court that an informal response is not a "formal opinion," since the Commission has considered it. Pagano, agreeing with the Commissioner, stated that the alternative to circulating it to the Commission is circulating it via the SCEP process. However, he added, it is felt that because of the proximity of the Commissioners' offices to SCEP, while it might offer some additional protection, it is not "fool proof."

The Chairman, commenting that "informal" responses should remain at that level, asked about the input of an "informal opinion." Pagano replied that it is not protected by Section 713 of Title VII nor Section IX of the Portal-to-Portal Act; and that the requestors are advised that while they may rely on it, they are not exempt from liability.

Commissioner Webb said that if the Commission states and describes a court's position in an informal opinion, it has, in effect, adopted that position. He expressed concern that a Commission policy determination may be in the public domain without the Commission's knowledge.

Chairman Thomas asked why not make all letters "formal opinion" letters. Pagano responded that it is a time consuming process which involves a lot of work for the Office of Legal Counsel and SCEP and resources are limited. Commissioner Webb commented that making all opinions "formal" would get the Commission involved in making policy, as well as eliminating the concern about possible court interpretation of documents that are not formal opinion letters.
additionally, he stated that in cases where there is insufficient information to render a "formal opinion," why not simply state that the letter has been reviewed and does not meet the criteria set forth in the regulations.

Legal Counsel Dupre noted that this procedure would ultimately be a real time consuming indeavor on the part of the Commission.

Chairman Thomas then moved to postpone Items 10 thru 12, relating to Opinion Letter Procedures, and reschedule same for the July 10 Commission Meeting.

Commissioner seconded the motion.

Commissioner Alvarez suggested, as another option, that the Commission should consider whether a "no action" letter like that used at the Security Exchange Commission could be used.

By a vote of 4 to 0, the motion to postpone the items was approved.

Voting in the affirmative: Chairman Thomas, Commissioner Gallegos, Commissioner Webb, Commissioner Alvarez

(E) Pension Benefits at Normal Retirement Age - Public Comments and Options

Commissioner Webb moved the item for discussion.
Commissioner Gallegos seconded the motion.

J. Pagano provided an analysis of comments received in response to the Commission's series of questions published in 1983, along with the options which were subsequently developed, and provided a legislative history of the issue. He reported that approximately 700 comments were received and the overwhelming majority of the comments favored the change.

Arguments for Changing the Special Rules

--Inequitable because they treat older workers differently than younger workers;

--Encourage earlier retirement and discourage continued employment after normal retirement age;

--Constitute windfall to employers because they don't have to make additional contributions after normal retirement age. In addition, they earn interest on money paid because the employee retires later;

--Drain on the Social Security System

Arguments Against Changing the Special Rules

--Contrary to the 1978 Legislative History;

--Would conflict with ERISA;

--Would impose additional cost on employers

Pagano apprised the Commission of the following options:

--Republish the rules unchanged;

--Adopt the rules, but attempt to confine their impact to the Elisburg Letter (i.e., limit the effect of the special rules);

--Rescind the rules and do nothing;

--Rescind the rules and replace them with other rules or interpretations that would provide crediting and contributions after normal retirement age;

Commissioner Webb, referencing the Elisburg Letter, asked if it should be treated as a "legislative observation" or "legislative history." Pagano responded that it should be accorded greater importance because of its history, but said he did not believe that it legally prevents the Commission from taking any action.

Commissioner Alvarez asked what is the normal retirement age under the Interpretative Bulletin. Chris Mackaronis, Office of Legal Counsel, responded that under ERISA, employers may establish their own normal retirement age contingent upon the type of plan they select, but not later then 65 years of age, or 10 years participation in a plan. Commissioner Alvarez then asked how could there have been a form of discrimination before the amendment if the employer decided that the normal retirement age was 60. Pagano responded that prior to the 1978 amendment, under that interpretation, the employer would have been required to continue contribution and crediting until the employee actually retired regardless of age.

Commissioner Alvarez asked what was DOL's basis for changing its position on retirement. Pagano replied that based on the 1967 Act, DOL issued interpretations that provided for equal benefits or equal costs, and if that principle is applied to pension contributions, employers would have been required to continue contributions. In 1978, they changed that interpretation to promulgate these Special Rules on the basis of the exchange between Assistant Secretary Elisburg, and certain Senators and Congressmen. Chairman Thomas asked how widely circulated was the Elisburg Letter.

Pagano stated that it was distributed to all the leaders who were involved in the passage of the 1978 amendment, and was also printed in the Congressional Record. Additionally, he added that portions of it were contained in the Interpretative Bulletin that was circulated regarding those hearings.

Commissioner Alvarez stated that he felt that Congress was fairly clear on the legislative history and indicated that, given that legislative history, he would have problems with agreeing to crediting pension service until age 70.

Chairman Thomas moved to rescind the Special Rules and replace them with interpretations or substantive rules requiring continued post-normal retirement age contributions and credit. Commissioner Webb seconded the motion.

By a vote of 3 to 1, the Commission adopted the motion.

Voting in the affirmative: Chairman Thomas, Commissioner Gallegos, Commissioner Webb

Voting in the negative: Commissioner Alvarez

(F) Adjournment of Open Session

Chairman Thomas adjourned the open session at 11:10 AM.

The foregoing is a record of the final votes of each Member of the Equal Employment Opportunity Commission in every agency proceeding on which final action was voted at the open portion of the Commission meeting held June 26, 1984.

7/31/84
(Seal)

Treva McCall
Treva McCall, Executive Secretary
to the Commission

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUN 13 1984

MEMORANDUM

TO: Clarence Thomas
Chairman

Tony E. Gallegos
Commissioner

William A. Webb
Commissioner

Fred W. Alvarez
Commissioner

FROM: Constance L. Dupre CLD
Legal Counsel

SUBJECT: Proposed Apprenticeship Program
Regulation 29 CFR Part 1625

Pursuant to Executive Order 12067, the Commission solicited views from the Department of Labor regarding the Commission's proposed Apprenticeship Program Rule. The Department of Labor, consistent with their own apprenticeship program guideline, is opposed to the Commission's proposed rule. (*See* attached letter from the Department of Labor received May 3, 1984.) The letter sent by the Department of Labor does not present any new arguments against the Commission's proposed rule. The preamble to the proposed rule notes the Department's position. A copy of the proposed rule, as revised, is attached hereto.

Ms. Constance L. Dupre
Legal Counsel
Equal Employment Opportunity Commission
2401 E. Street, N.W.
Washington, D.C. 20506

Dear Ms. Dupre:

This is in response to your request for our views on a proposed regulation to be promulgated under section 9 of the Age Discrimination in Employment Act of 1967 (ADEA). As you are aware, the present interpretive guideline exempting apprenticeship programs from the ADEA was first issued by this Department in 1969. That guideline was republished by the Commission in 1981. While we recognize that following the Quinn decision the Commission must revisit the apprenticeship issue, we are concerned about the elimination of the exemption for apprenticeship programs under your proposed regulation.

In our view the elimination of the exemption for apprenticeship programs would be detrimental to our efforts to promote these programs in the private sector. Apprenticeship is viewed by the employer and union communities as a training program for youth in which the initial investment in training can be recouped over the apprentice's work life. In this context, loss of discretion to limit apprenticeship to younger workers could serve as a disincentive to employer and union sponsorship of these programs. This sentiment was reflected in the comments of this Department and others on the Commission's proposed removal of this exemption in 1980. Unions in construction and other apprenticeable trades, employers and the National Association of Manufactures all actively opposed removal of the exemption in the regulations at that time.

In accordance with our comments, we would recommend that the exemption for apprenticeship be retained in the ADEA regulations.

Sincerely,

Francis X. Lilly

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

Age Discrimination in Employment

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed Rule.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. (ADEA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. Prior to the Commission assuming jurisdiction for the enforcement of the ADEA, the Department of Labor had published an interpretive guideline which provided that apprenticeship programs were not subject to the restrictions of the ADEA. 29 CFR §860.106, published at 34 FR 323 (January 9, 1969). The Commission, on September 29, 1981, republished the Department of Labor's guideline, 29 CFR §1625.13, (September 29, 1981), 46 FR 47724. After an exhaustive review of the ADEA and its legislative history, the Commission proposes to rescind 29 CFR §1625.13, as it presently exists, and promulgate the following substantive rule regarding apprenticeship programs under the ADEA.

DATE: Comments ~~must be~~ received on or before _______, 1984.

ADDRESS: Send comments to Treva McCall, Executive Secretary, Office of the Chairman, Room 5215, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20507.

FOR FURTHER INFORMATION CONTACT: John Pagano or J. Kenneth L. Morse, Telephone (202) 634-6592.

SUPPLEMENTAL INFORMATION: The Department of Labor on January 9, 1969, published an interpretive guideline which provided that apprenticeship programs were not covered by the ADEA. See former 29 CFR §860.106, 34 FR 323. The Department of Labor adopted this interpretive guideline without previously publishing the guideline in the Federal Register and offering the opportunity for notice and comment. The Secretary of Labor took the position that promulgation of the guideline without the opportunity for notice or comment was appropriate because the guideline was interpretive and not substantive. Preamble to Part 860, 29 CFR, published in 34 FR No. 6 (January 9, 1969). While the Secretary of Labor had the legal authority to grant administrative exemptions to the ADEA under Section 9 of the Act, this authority was not exercised in promulgating the Department of Labor's apprenticeship program guideline. The Commission has, pursuant to Executive Order 12067, coordinated issuance of this proposed rule with the Department of Labor. The Department of Labor continues to assert that apprenticeship programs should not be covered by the ADEA.

On September 29, 1980, the Commission proposed a rescission of the Department of Labor's apprenticeship program guideline and the promulgation of a legislative rule which provided that apprenticeship programs were subject to the proscriptions of the ADEA. 45 FR 64212-14 (September 29, 1980). Because of a split vote of the Commission, after reviewing the comments received during the comment period, the proposed legislative rule was not promulgated. Instead, the Department of Labor's guideline was republished. Preamble to Part 1625, 29 CFR, published in 46 FR 47726 (September 29, 1981). This interpretive guideline was recently reviewed by the Federal District Court for the Northern District of New York in Quinn v. New York State Electric and Gas Corp., ___ F.Supp. ___, 32 FEP Cases 1070 (N.D. N.Y., August 17, 1983). The court in Quinn, noting that the Department of Labor had not promulgated a legislative rule but instead had merely published an interpretive guideline, concluded that the interpretive rule that the Commission had republished was "not to be given effect" since it was "inconsistent with the language, purpose, and history of the ADEA..." (Id. at 1071).

Following the Quinn decision the Commission reconsidered the issue of the propriety of the apprenticeship guideline. Following an exhaustive review of the language of the ADEA, the Act's legislative history, and the comments received when the Commission previously considered rescinding the Department of Labor's apprenticeship guideline, 45 FR 64212-14 (September 29, 1980), the Commission has decided to propose a substantive regulation which would provide that apprenticeship programs are subject to the proscriptions of the ADEA. The Commission bases its proposal on several factors.

First, the Commission believes that the existing interpretation runs counter to the stated purposes of the statute as enacted in 1967. Section 2(b) of the ADEA, 29 U.S.C. 621(b), states unequivocally that:

> It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment....

With this purpose in mind, Congress fashioned Sections 4(a) and 4(c) of the Act, 29 U.S.C. 623(a) and 623(c), which set forth with particularity the proscribed conduct of employers and labor organizations. On their face, these extensive prohibitions would prohibit either an employer or a labor organization from establishing discriminatory age limitations in apprenticeship programs. Moreover, to the extent that both employers and labor organizations are prohibited by the statute from discriminating on the basis of age in apprenticeship programs, the Commission interprets these two sections of the statute to encompass joint labor-management apprenticeship programs and to prohibit them from engaging in those same discriminatory acts. The Commission rejects the anomalous result that employers and labor organizations can do in tandem those acts which they cannot do alone. The Commission believes that as remedial and humanitarian legislation, the ADEA is to be liberally construed. The statute does not support an interpretation which would completely exclude apprenticeship programs from the Act's coverage.

Second, and equally important, there is nothing in the legislative history of the Act which would support the interpretation originally contained in 29 CFR §860.106 and continued at 29 CFR §1625.13. Nowhere in the legislative history is there any reference, explicitly or by implication, that apprenticeship programs were not intended to fall within the Act's coverage. Congress was aware that certain state laws specifically exempted apprenticeship programs, see Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, on Age Discrimination in Employment, 90th Congress, 1st Sess. (1967), p. 117; Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor on Age Discrimination in Employment, 90th Cong., 1st Sess. (1967), p. 37, but nevertheless declined to enact a similar provision, with the result that apprenticeship programs were intended to be subject to the Act's coverage.

Third, Congress integrated into this comprehensive statutory scheme Section 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), which permits an employer or labor organization:

> (1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; (29 U.S.C. 623(f)(1)).

Certain apprenticeship programs may have legitimate reasons for excluding employees on the basis of age. The Commission concludes, however, that those few exceptions do not provide a basis for an interpretation which would permit all apprenticeship programs to exclude employees of any age, since the Act otherwise provides for such exceptions.

Furthermore, the Commission wishes to note that Section 9 of the ADEA grants to the Commission the authority to "establish such reasonable exemptions to and from any or all provisions of this Act as ... necessary and proper in the public interest." The Commission believes that Section 4(f)(1) and Section 9 of the Act provide sufficient flexibility to accommodate those apprenticeship programs which can establish legitimate age limitations, thereby obviating the need for the blanket exception contained in the former interpretation.

For all the above reasons, the Commission proposes to rescind the former interpretation and, in exercising its substantive rulemaking authority under Section 9 of the ADEA, promulgate a rule which will clearly establish the coverage of apprenticeship programs under the Act.

The promulgation of this legislative rule will not affect how apprenticeship programs are implemented. The rule only will alter which applicants are to be considered in determining who can participate in the apprenticeship programs. This rule, therefore, does not have an "annual effect" on the economy of $100 million or more as those terms are used in Executive Order 12291. For that reason, these regulations are not a "major rule," and a regulatory impact analysis is not required by Executive Order 12291.

Similarly, the Commission certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not result in a significant economic impact on a substantial number of small entities. For this reason, a regulatory flexibility analysis is not required.

The Commission received comments from a substantial number of organizations and individuals in response to its original proposed rule holding apprenticeship programs subject to the proscriptions of the ADEA. 45 FR 64212-14 (September 29, 1980). These prior comments will become a part of the record for this proposed rule unless the groups which submitted those comments ask in writing that their comments be withdrawn. The Commission is desirous of receiving additional comments concerning this rule from interested members of the public. Accordingly, the Commission will receive comments for a period of 60 days after publication. If appropriate, the Commission will reconsider the views expressed here before publishing a final rule.

In addition, in accordance with Executive Order 12067, the Commission has solicited the views of affected Federal agencies.

The proposed rule appears below.

Signed at Washington, D. C. this ____ day of ________, 1984.

For the Commission,
Clarence Thomas
Clarence Thomas
Chairman

Equal Employment Opportunity
Commission

It is proposed to amend 29 Code of Federal Regulations as follows:

PART 1625 - AGE DISCRIMINATION IN EMPLOYMENT ACT

Section 1625.13 [Rescinded]

1. In Subpart A, Section 1625.13 would be rescinded in its entirety.

2. In Subpart B, Section 1625.21 would be added to read as follows:

§1625.21 Apprenticeship Programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the proscriptions of Sections 4(a) and 4(c) of the Act, 29 U.S.C. 623(a) and (c). Age limitations in those programs are valid only if excepted under Section 4(f)(1) or specifically exempt under Section 9 of the Act in accordance with the rule set forth in 29 CFR 1627.15.

[Sec. 9, 81 Stat. 604; (29 U.S.C. 628); Sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.]

BEFORE THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C.

In the Matter of:)
)
GRAY PANTHERS;)
OLDER WOMEN'S LEAGUE,)
)
Petitioners.)
)

PETITION FOR RULEMAKING
AND OTHER ACTION

1. This is a petition for rulemaking and other administrative action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §552 et seq., and 29 C.F.R. 1601.35. Petitioners seek action by the Equal Employment Opportunity Commission (EEOC) to issue a proposed rule, and to withdraw an existing exclusion of apprenticeship programs from coverage under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq. The apprenticeship exclusion appears at 29 C.F.R. §1625.13, and removes prohibitions in the ADEA from bonafide apprenticeship programs which meet the standards for such programs specified in 29 C.F.R. §§521.2 and 521.3.

2. Petitioner Gray Panthers is a national association with offices located in Philadelphia, Pennsylvania. It has 70,000 members and 90 local chapters. The Gray Panthers seek relief on behalf of its members and other persons protected under the ADEA who desire to participate in employers' apprenticeship programs but are excluded from such participation by the apprenticeship exclusion.

3. Petitioner Older Women's League (OWL) is a national, not-for-profit organization serving the interests of older women in the United States, including older working women. OWL seeks relief in its own behalf and on behalf of all OWL members who desire to participate in apprenticeship programs in their employment and who have suffered, and continue to suffer, economic and other injury because of the apprenticeship exclusion at issue here.

4. The ADEA makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's age, with respect to persons at least 40 years of age. 29 U.S.C. §§623(a)(1) and 631. The Act contains no basis

for permitting an employer to limit participation in an apprenticeship program on grounds of age.

5. The apprenticeship exclusion appearing at 29 C.F.R. §1625.13 is contrary to law. First, it violates the stated purposes of the ADEA, 29 U.S.C. §621(b), which provide for the employment of older persons based on their ability rather than their age and prohibits arbitrary age discrimination in employment. Second, the apprenticeship exclusion is unsupported in the legislative history of the ADEA. Third, the ADEA creates an exception from coverage for bona fide occupational qualifications reasonably necessary to the normal operation of a business, 29 U.S.C. §623(f)(1), and authorizes individual exemptions to be issued by the Commission, 29 U.S.C. §628. These sections undercut any basis for the blanket exception covering all workers in all industries contained in the apprenticeship exclusion.

6. The Department of Labor first published the apprenticeship exclusion on January 9, 1969. 29 C.F.R. §860.106, 34 Fed. Reg. 323. The Department published the exclusion without opportunity for public notice or comment on the grounds that it was interpretative and not substantive. On July 1, 1979, responsibility and enforcement authority under the ADEA was transferred from the Department of Labor to the EEOC pursuant to Reorganization Plan No. 1 of 1978. 43 Fed. Reg. 19807 (May 9, 1978).

7. The EEOC recognized that the apprenticeship exemption "runs counter to the stated purpose of the statute" and proposed its rescission and replacement with a legislative rule that apprenticeship programs are subject to prohibitions under the ADEA. 45 Fed. Reg. 64212 (September 29, 1980).

8. Following a public comment period, the EEOC by a split vote failed to promulgate a final rule and instead republished the Department of Labor guideline. 46 Fed. Reg. 47726 (September 29, 1981).

9. After review, the EEOC on June 26, 1984, voted unanimously to rescind the apprenticeship exclusion and to exercise substantive rulemaking authority under the ADEA by promulgating a rule explicitly establishing coverage of

apprenticeship programs. The EEOC determined that the proposed regulation was not a major rule requiring a regulatory impact analysis, that it would not result in a significant economic impact on a substantial number of small entities, and accordingly that a regulatory flexibility analysis is not required.

10. Despite its vote to promulgate a rule to eliminate the apprenticeship exclusion, and despite its conclusion that the exclusion violates the ADEA, the Commission has taken no action to date to implement its vote of June 26, 1984.

11. Although the EEOC itself has found the apprenticeship exclusion to violate the ADEA, the EEOC provides covered employers under the ADEA with a defense for their discriminatory conduct. Under the provisions of 29 U.S.C. §626(e)(1) of the ADEA, an employer who demonstrates a reliance on an administrative interpretation by good faith objective evidence is immunized from liability for conduct otherwise unlawful.

12. A United States District Court has held the apprenticeship exclusion "inconsistent with the language, purpose and history of the ADEA...." Quinn v. New York State Electric and Gas Corp., 569 F.Supp. 655 (1983). Nonetheless, the employer in Quinn was immunized from liability because of the employer's asserted reliance on the invalid exclusion. 621 F.Supp. 1086. Older workers face exclusion from training programs by operation of the admittedly invalid guideline apprenticeship provision at §1625.13 and the §626(e)(1) defense.

13. The apprenticeship guideline creates unemployment hardship for older workers. Ninety percent of older job losers' wage losses arise from nontransferability of the workers' firm-specific skills and knowledge associated with job experience. An older worker who loses a job remains unemployed more than 50 percent longer, on average, than younger job losers.

14. Inability to participate in apprenticeship programs impairs the ability of older workers to acquire needed retraining skills, to achieve job advancement, and in many cases, to achieve job retention in the face of an employer's reduction in force. As a result, these older employees face precisely the injuries which the Age Discrimination in Employment Act is designed to prevent.

WHEREFORE, Petitioners request the following relief from the Equal Employment Opportunity Commission:

(A) that the Commission immediately rescind the apprenticeship exclusion appearing at 29 C.F.R. §1625.13 and notify affected members of the public that the interpretation is not subject to reliance under the provisions of 29 U.S.C. §626(e)(1);

(B) that the Commission immediately publish a notice of proposed rulemaking for public comment with respect to its proposed rule approved on June 26, 1984, to be added at 29 C.F.R. §1625.21, subjecting apprenticeship programs to coverage under the ADEA;

(C) that the Commission publish a final rule at §1625.21 within 90 days of publication of the proposed rule described above; and

(D) that the Commission take such further relief as may be necessary.

DATED: May 8, 1987

Respectfully submitted,

Burton D. Fretz

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Attorneys for Petitioners

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL 30 1987

Burton D. Fretz, Esquire
National Senior Citizens Law Center
2025 M Street, N.W., Suite 400
Washington, D.C. 20036

Dear Mr. Fretz:

This is in response to your Petition for Rulemaking and Other Action, filed with the Equal Employment Opportunity Commission on May 8, 1987. In your Petition, you requested that the Commission: (A) Rescind the interpretative rule set forth at 29 C.F.R. § 1625.13 and notify all affected members of the public that said rule is not subject to reliance under 29 U.S.C. § 626(e)(1); (B) Publish for public comment a notice of proposed rulemaking which was approved by the Commission on June 26, 1984, to be added at 29 C.F.R. § 1625.21; and (C) Publish a final substantive rule at 29 C.F.R. § 1625.21, 90 days subsequent to the publication of the above referenced proposed rule.

Pursuant to 5 U.S.C. § 555(e), you are hereby notified that the Commission has determined to deny your Petition. The more pertinent reasons for this decision are:

1. Pursuant to the Commission's Congressional mandate to administer and enforce the Age Discrimination in Employment Act of 1967, as amended ("ADEA" or the "Act"), it has determined, after careful reassessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that Congress when enacting the ADEA did not intend to subject *bona fide* apprenticeship programs to the prohibitions of the Act.

2. Congress patterned the ADEA after Title VII of the Civil Rights Act of 1964, as amended (Title VII). In fact, many of the substantive prohibitions of the ADEA were derived verbatim from Title VII. *Lorrillard v. Pons*, 434 U.S. 575 (1978). However, while sections 703(a) through (d) of Title VII, and sections 4(a) through (e) of the ADEA, address discrimination in employment, it is *only* § 703(d) of Title VII that specifically addresses discrimination in admission to, or employment in, programs providing apprenticeship or other training. Inclusion of § 703(d) shows that Congress intended Title VII to prohibit discrimination in apprenticeship programs on account of race, color, religion, sex and national origin, and that §§ 703(a) and (c) alone were considered insufficient to do so. If apprenticeship is covered by the ADEA, it would have to be under §§ 4(a) and (c) (sections virtually identical to §§ 703(a) and (c)). Yet, if the general language of §§ 4(a) and (c) were intended to be broad enough to reach apprenticeship programs, then the identical language of §§ 703(a) and (c) should have sufficed as well — clearly, however, Congress believed something more was necessary in Title VII in order to reach apprenticeship programs. The Commission believes that the inclusion of § 703(d) in Title VII, and the absence of a similar provision in the ADEA clearly demonstrates that Congress made a deliberate decision not to include apprenticeship programs under the Act. Furthermore, the fact that Congress saw a need for § 703(d) in Title VII illustrates that *bona fide* apprenticeship programs have been traditionally viewed as more in the nature of education and less in the nature of employment (apprenticeship has been traditionally recognized as an extension of the educational process to prepare young men and women for skilled employment). This factor is extremely important in that the ADEA and its legislative history reflect a Congressional concern exclusively for employment discrimination. The legislative history of the ADEA and the omission of a section similar to Title VII's § 703(d) indicate that Congress intended to provide retraining and counseling opportunities for older workers not by passage of the ADEA, but by the earlier passage of a companion Act, the Manpower Development and Training Act (since replaced by the Job Training Partnership Act).

3. In reaching its conclusion that Congress did not intend to cover apprenticeship programs under the ADEA, the Commission has given considerable weight to the Department of Labor's (DOL) prior interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA.

Under established principles of statutory construction, Congress is presumed aware of longstanding interpretations of a statute—here DOL's (since 1967) and the Commission's (since 1979) interpretation of the ADEA, and DOL's (since 1937) interpretation and implementation (allowing age restrictions) of the National Apprenticeship Act, 29 U.S.C. §§ 50 *et seq.* — when Congress has not acted to change such longrtanding interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: ". . . a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981), *citing Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 208, 210. Congressional silence during this long a period suggests its consent to the interpretation. *Id*. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. *Andrus v. Allard*, 444 U.S. 51, 57 (1979).

4. The intent of Congress to leave *bona fide* apprenticeship programs outside the scope of ADEA coverage has also been reflected by its handling of other related matters. A number of bills have been introduced that would have prohibited age restrictions in apprenticeship programs, but all have been unsuccessful. For example, there were two bills introduced in the 98th Congress to amend the National Apprenticeship Act to this end, S. 981 (protecting individuals up to age 40) and S. 1751 (protecting individuals regardless of age). 98th Cong., 1st Sess. (1983). Also, in the 95th Congress, an unsuccessful attempt was made to amend Title VII to include age and handicap discrimination. Had it been successful, § 703(d) on apprenticeship would have applied to age discrimination as well. H.R. 3504, 95th Cong., 1st Sess. (1977). Finally, in 1975 Congress passed the Age Discrimination Act (ADA), prohibiting age discrimination by programs receiving federal funds. Congress structured the ADA, however, to exclude labor-management joint apprenticeship training programs. 42 U.S.C. § 6103(c)(1).

In denying this petition, the Commission wishes to emphasize that, as clearly stated in § 1625.13, only *bona fide* apprenticeship programs are outside the scope of the ADEA. In order to qualify as such, a program must satisfy the stringent standards set out at 29 C.F.R. §§ 521.2 and 521.3.

These standards include but are not limited to: employment and training of an apprentice in an apprenticeable trade; one year or more of work experience with progressively increasing wages which average at least 50% of the journeyman's rate over the period of the apprenticeship; submission of the apprenticeship program and apprenticeship agreement to the recognized apprenticeship agency for registration; adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning the progress of the apprentice; normally at least 144 hours a year of related instruction which is designed to provide the apprentice with the theoretical and technical subjects related to the trade. Apprenticeship programs that do not meet all of the standards in 29 C.F.R. §§ 521.2 and 521.3, summarized above, are fully subject to the ADEA.

In recognition of the need by older workers for protection from age discrimination in training programs generally, the Commission, when engaged in investigation, conciliation and enforcement, shall strictly scrutinize the challenged apprenticeship program to insure that it is in fact *bona fide* and is carrying out its stated purposes regarding the training of apprentices.

We appreciate the interest shown by the individuals and organizations supporting the Petition. Your comments have been most useful to us in our review of present Commission policy. As stated at the outset, however, our review has led us to conclude that the existing interpretation at 29 C.F.R. § 1625.13 correctly reflects the original intent of Congress with regard to the ADEA and *bona fide* apprenticeship programs. We believe that any change in that position is a determination properly left for the Congress.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED
1987 JUL 20 PM 4:06
OFFICE OF THE CHAIRMAN

JUL 20 1987

PURPOSE: Action

ACTION REQUESTED BY:
Elizabeth M. Thornton
Office of Legal Counsel

MEMORANDUM

TO : Cynthia Matthews
Executive Officer
Executive Secretariat

FROM : Elizabeth M. Thornton
Associate Legal Counsel
Coordination and Guidance Services
Office of Legal Counsel

SUBJECT: Apprenticeship Package

Please distribute the attached revised response to the Gray Panthers. The original draft response was provided to your office and circulated to the Commissioners on July 15th. The revision to the draft response (appearing as footnote one) was requested by Commissioner Kemp.

If you have any questions regarding this matter, please call Joseph N. Cleary at 634-7643.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

Burton D. Fretz, Esquire
National Senior Citizens Law Center
2025 M Street, N.W., Suite 400
Washington, D.C. 20036

Dear Mr. Fretz:

This is in response to your Petition for Rulemaking and Other Action, filed with the Equal Employment Opportunity Commission on May 8, 1987. In your Petition, you requested that the Commission: (A) Rescind the interpretative rule set forth at 29 C.F.R. § 1625.13 and notify all affected members of the public that said rule is not subject to reliance under 29 U.S.C. § 626(e)(1); (B) Publish for public comment a notice of proposed rulemaking which was approved by the Commission on June 26, 1984, to be added at 29 C.F.R. § 1625.21; and (C) Publish a final substantive rule at 29 C.F.R. § 1625.21, 90 days subsequent to the publication of the above referenced proposed rule.

Pursuant to 5 U.S.C. § 555(e), you are hereby notified that the Commission has determined that your Petition must be denied in its entirety. The more pertinent reasons for this decision are:

1. Pursuant to the Commission's Congressional mandate to administer and enforce the Age Discrimination in Employment Act of 1967, as amended ("ADEA" or the "Act"), it has determined, after careful reassessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that Congress when enacting the ADEA did not intend to subject bona fide apprenticeship programs to the prohibitions of the Act. 1/

2. Congress patterned the ADEA after Title VII of the Civil Rights Act of 1964, as amended (Title VII). In fact, many of the substantive prohibitions of the ADEA were derived verbatim from Title VII. Lorrillard v. Pons, 434 U.S. 575 (1978). However, while sections 703(a) through (d) of Title VII, and sections 4(a) through (e) of the ADEA, address discrimination in employment, it is only sec. 703(d) of Title VII that specifically addresses discrimination in admission to, or employment in, programs providing apprenticeship or other training. Inclusion of sec. 703(d) shows that Congress intended Title VII to prohibit discrimination in apprenticeship programs on account of race, color, religion, sex and national origin, and that secs. 703(a) and (c) alone were considered insufficient to do so. If apprenticeship is covered by the ADEA, it would have to be under secs. 4(a) and (c) (secs. virtually identical to secs. 703(a) and (c)). Yet, if the general language of secs. 4(a) and (c) were intended to be broad enough to reach apprenticeship programs, then the identical language of secs. 703(a) and (c) should have sufficed as well -- clearly, however, Congress believed something more was necessary in Title VII in order to reach apprenticeship programs. The Commission believes that the inclusion of sec. 703(d) in Title VII, and the absence of a similar provision in the ADEA clearly demonstrates that Congress made a deliberate decision not to include apprenticeship programs under the Act. Furthermore, the fact that Congress saw a need for sec. 703(d) in Title VII illustrates that bona fide apprenticeship programs have been traditionally viewed as more in the nature of education and less in the nature of employment (apprenticeship has been traditionally recognized as an extension of the educational process to prepare young men and women for skilled employment). This factor is extremely important in that the ADEA and its legislative history reflect a Congressional concern exclusively for employment discrimination. The legislative history of the ADEA and the omission of a section similar to Title VII's 703(d) indicate that Congress intended to provide retraining and counseling opportunities for older workers not by passage of the ADEA, but by the earlier passage of a companion Act, the Manpower Development and Training Act (since replaced by the Job Training Partnership Act).

---

1. As clearly stated in sec. 1625.13, its provisions pertain only to bona fide apprenticeship programs. In order to qualify as such, a program must satisfy the stringent standards set out at 29 C.F.R. §§ 521.2 and 521.3. Apprenticeship programs that do not meet all of these standards are fully subject to the ADEA.

3. In reaching its conclusion that Congress did not intend to cover apprenticeship programs under the ADEA, the Commission has given considerable weight to the Department of Labor's (DOL) prior interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA.

Under established principles of statutory construction, Congress is presumed aware of longstanding interpretations of a statute--here DOL's (since 1967) and the Commission's (since 1979) interpretation of the ADEA, and DOL's (since 1937) interpretation and implementation (allowing age restrictions) of the National Apprenticeship Act, 29 U.S.C. §§ 50 et seq. -- when Congress has not acted to change such longstanding interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: ". . . a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n. 17 (1981), citing Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 208, 210. Congressional silence during this long a period suggests its consent to the interpretation. Id. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. Andrus v. Allard, 444 U.S. 51, 57 (1979).

4. The intent of Congress to leave bona fide apprenticeship programs outside the scope of ADEA coverage has also been reflected by its handling of other related matters. A number of bills have been introduced that would have prohibited age restrictions in apprenticeship programs, but all have been unsuccessful. For example, there were two bills introduced in the 98th Congress to amend the National Apprenticeship Act to this end, S. 981 (protecting individuals up to age 40) and S. 1751 (protecting individuals regardless of age). 98th Cong., 1st Sess. (1983). Also, in the 95th Congress, an unsuccessful attempt was made to amend Title VII to include age and handicap discrimination. Had it been successful, sec. 703(d) on apprenticeship would have applied to age discrimination as well. H.R. 3504, 95th Cong., 1st Sess. (1977). Finally, in 1975 Congress passed the Age Discrimination Act (ADA), prohibiting age discrimination by programs receiving federal funds. Congress structured the ADA, however, to exclude labor-management joint apprenticeship training programs. 42 U.S.C. § 6103(c)(1).

We appreciate the interest shown by the individuals and organizations supporting the Petition. Your comments have been most useful to us in our review of present Commission policy. As stated at the outset, however, our review has led us to conclude that the existing interpretation at 29 C.F.R. § 1625.13 correctly reflects the original intent of Congress with regard to the ADEA and bona fide apprenticeship programs. We believe that any change in that position is a determination properly left for the Congress.

Sincerely,

Clarence Thomas
Chairman

Appendix VI

Documents Pertaining to an EEOC Request That a Letter to the Chairman of the Committee From the Chairman of the EEOC Dated October 8, 1987, Not Be Placed in This Hearing Record

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

JUL 15 1988

The Honorable John Melcher
Chairman
Special Committee on Aging
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

On July 13, 1988, Mr. Lloyd Duxbury of your staff advised the Commission that the information which EEOC had submitted to your Committee on October 6, 1987 with a request for confidentiality will be published as part of the hearing record. I am dismayed by and strongly disagree with the Committee's decision to publish this information.

In response to requests from your Committee, EEOC expended hundreds of hours of staff time compiling documents and preparing responses to written questions posed by the Committee. Because some of the questions sought information that was discussed at a Commission meeting which was properly closed to the public pursuant to the Sunshine Act, 5 U.S.C. §552b(c)(10), and that was protected by the governmental deliberative process privilege, a separate submission dated October 6, 1987 was made in response to those questions. The letter informed the Committee that the information was discussed at a closed Commission meeting and that it was privileged and requested that it not be made part of the public record. The submission was accepted without comment, and, therefore, it was assumed by us that the Committee would honor the Commission's Sunshine Act determination and request for confidentiality. This assumption was based on our own investigative procedures where we impose on ourselves the obligation to deal openly and fairly with potential witnesses. Therefore, whenever potential witnesses request confidentiality from our investigators, EEOC staff either agree to the confidentiality request or inform the potential witness that we cannot accept the information on those terms. Thus, I was distressed to learn that the Committee has decided to ignore our request for confidentiality nine months after accepting the proffered information.

I am also concerned about the effect which release of this type of information could have on the EEOC's mission. The Commission is a collegial body which reaches consensus and decisions after the free and frank exchange of ideas among its members and with its staff. Release of one Commissioner's statements or position or someone's characterization of one Commissioner's statements or position may mislead the public about what the entire Commission has decided or what the EEOC's position is. In addition, Commissioners and staff may be less willing to exchange ideas and opinions or engage in rigorous and challenging discussion in the future for fear that excerpts of their remarks may later be disclosed and misunderstood.

I think that release of the submitted information could confuse or mislead the public and pose a real danger to the quality of future Commission deliberations. I strongly disagree with the Committee's decision to disclose this information despite the Sunshine Act's recognition of the need for its confidentiality and authorization to withhold it and would ask that the Committee honor the governmental deliberative process privilege as requested when the information was originally submitted.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

MICHAEL DAVIDSON
COUNSEL
KEN U. BENJAMIN, JR.
DEPUTY COUNSEL
MORGAN J. FRANKEL
SUSAN B. FINE
ASSISTANT COUNSEL

Phone: 202-224-4435

United States Senate
OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

MEMORANDUM

To: The Honorable John Melcher

From: Michael Davidson MD
Morgan J. Frankel M.F.

Re: Special Committee on Aging's Authority to Publish EEOC Documents in Hearing Record

Date: July 20, 1988

The Special Committee on Aging ("the Committee") has been conducting an oversight investigation of the enforcement by the Equal Employment Opportunity Commission ("the EEOC" or "the Commission") of the Age Discrimination in Employment Act ("the ADEA"). You have requested our view concerning the Committee's authority to publish material that it has obtained from the EEOC as part of its hearing record. As discussed below, we believe that the Committee has unquestioned authority to publish materials obtained from the EEOC as part of its oversight investigation. The decision whether publication of records documenting the EEOC's performance of its responsibility to enforce the ADEA will further the oversight mission of the Committee and the Senate is committed to the sound discretion of the Committee.

The Chairman of the Commission, Clarence Thomas, asserts in his letter to you of July 15, 1988, that the Commission had requested that the Committee treat the material confidentially and that disclosure would chill candid discussion within the Commission. Our memorandum to you does not comment on these concerns of the EEOC Chairman, as they present issues of policy for the Committee. Instead, we have limited our analysis to the question of the Committee's legal authority to publish the materials.

Background of Investigation

As a part of the Committee's investigation, the Committee has been carefully studying two litigation matters whose handling by the Commission the Committee believes can significantly inform its judgment concerning the extent to which the Commission has faithfully fulfilled its mission to enforce the ADEA. These two cases are Lusardi v. Xerox Corporation (D.N.J.), a private ADEA class action suit, which the EEOC voted last year not to supplement with the filing of a complaint of its own, and Cipriano v. Board of Education of the City School District of the City of North Tonawanda (W.D.N.Y.), another private ADEA suit, in which the Commission is appearing as an amicus curiae.

After a preliminary investigation by the Committee staff, the Committee held a hearing on September 10, 1987 on the EEOC's exercise of its ADEA enforcement authority, including its determination not to initiate an enforcement action against Xerox. The Chairman of the EEOC was one of the principal witnesses before the Committee at this hearing. As a follow-up to the questioning at the hearing, you directed to Chairman Thomas for written responses a number of further questions relating to the Commission's ADEA enforcement policy that there had not been adequate time to propound at the hearing. Several of these questions related to comments of Chairman Thomas' at a meeting of the Commission on March 16, 1987 at which the Commission received a briefing from its staff on the Xerox case. With the knowledge and permission of the Commission, the Committee staff listened to and prepared a transcript of the tape recording of the meeting. The Committee staff also obtained from the Commission for use in its investigation a number of EEOC documents pertaining to the Commission's actions in the Xerox and Cipriano cases.

Publication of Records Obtained from EEOC

You have asked for our guidance whether, if it chooses to do so, the Committee may include in its published hearing record the transcript of the EEOC meeting that the Committee staff has prepared, the EEOC documents that the Committee has obtained, and Chairman Thomas' written responses to your follow-up questions. Chairman Thomas has suggested that the Government in the Sunshine Act and the governmental deliberative process privilege restrict the Committee's ability to publish these materials and has requested that the Committee refrain from publishing them. For the reasons discussed below, we conclude that neither cited authority, nor any other rule, restricts the Committee's ability to publish any of these documents as part of its formal hearing record.

Although congressional committees should undoubtedly exercise care in determining whether to publish nonpublic deliberative records of an executive enforcement agency, the decision whether the publication of particular materials will fulfill the Committee's oversight mandate is the Committee's alone to make. Where the Committee determines, as part of its oversight and legislative responsibilities, that the public benefits to be obtained from documenting an agency's inadequate enforcement record outweigh the potential costs of chilling communications within the agency, the Committee has the unquestioned authority to publish nonpublic deliberative records of the agency.

The March 16, 1987 meeting was a closed meeting of the Commission at which the Commission received a briefing from its staff preparatory to the Commission's polled vote not to file a complaint against Xerox. The Commission apparently closed this meeting to the public under authority of exemption (c)(10) of the Government in the Sunshine Act, 90 Stat. 1241, 1242, 5 U.S.C. § 552b(c)(10) (1982), which exempts from the statute's "open meetings" requirement a meeting that "is likely to ... specifically concern ... the agency's participation in a civil action or proceeding."

The fact that the EEOC properly closed its March 16 meeting to the public under (c)(10) provides no basis for restraining the Committee from publishing the transcript that it created of the tape recording of the meeting. First, the Sunshine Act exemptions are permissive, not mandatory.1/ Therefore, the Sunshine Act creates no prohibition against public disclosure. Second, the Sunshine Act applies only to executive agencies, not to the Congress. 5 U.S.C. §§ 551(1), 552(e), 552b(a)(1). The EEOC's provision to the Committee of access to the recording of its meeting was consistent with the requirements of the Sunshine Act, which "does not constitute authority to withhold any information from Congress." 5 U.S.C. § 552b(l). The Sunshine Act does not have any applicability to materials that Congress has obtained from an executive agency, irrespective of whether an identical copy

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1/ The exemptions from public access do not apply "where the agency finds that the public interest requires otherwise." 5 U.S.C. § 522b(c); see H.R. Rep. No. 880, Pt. 1, 94th Cong., 2d Sess. 13 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 2183, 2194; 2 J. O'Reilly, Federal Information Disclosure § 23.07, at 23-19 (1987).

of the item in the agency's possession is covered by the Sunshine Act. Thus, the Sunshine Act simply has no impact on a Senate committee's exercise of discretion to publish records pertaining to a meeting that an executive agency properly closed under the Sunshine Act. For this reason, the Sunshine Act does not affect the Committee's determination to publish the transcript of the EEOC meeting, Chairman Thomas' written responses to your questions, or the documents that the Committee has obtained from the Commission.[2]

The deliberative process privilege is similarly inapplicable to the Committee's determination to publish these materials. The deliberative process privilege is a common-law privilege available to the government to protect from disclosure in civil litigation "records and information that would disclose the mental processes of an agency engaged in making a decision or formulating a policy."[3] Congress has provided executive agencies with a parallel exemption to withhold deliberative records from the public under the Freedom of Information Act. 5 U.S.C. § 552(b)(5). However, like the Sunshine Act, the deliberative process privilege is not mandatory and is not applicable to requests for information from the Congress. 5 U.S.C. § 552(c). The deliberative process privilege affords executive agencies with no protection from public disclosure of their records by Congress.

More generally, we are aware of no barrier to the Committee's publishing any of these materials whose publica-

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2/ The responses and the documents are not covered by the Sunshine Act even in the EEOC's hands, because they are not a "transcript, electronic recording, or minutes" of a meeting. 5 U.S.C. § 552b(f)(2).

3/ M. Larkin, Federal Testimonial Privileges § 5.02, at 5-15-5-16 (1987).

tion it deems necessary to performance of its oversight function. The Constitution provides the Congress with sole discretion to determine which of its proceedings to publish. U.S. Const., Art. I, sec. 5, cl. 3. The other branches of government "have no authority to oversee the judgment of the Committee in this respect." Doe v. McMillan, 412 U.S. 306, 313 (1973). The Committee's exercise of this constitutionally committed responsibility is subject only to statutory restrictions, such as perhaps the Trade Secrets Act, 18 U.S.C. § 1905 (1982), which Congress has determined to impose upon itself. No such authorities restricting the Committee's prerogative to publish the materials in this matter have been suggested or appear to exist.[4] Accordingly, the decision whether to publish these materials is the Committee's alone to make.

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[4] The ban on public disclosure by the Commission of certain informal endeavors to eliminate unlawful employment practices under section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b)(1982), has no applicability to this matter. The provision does not relate to ADEA enforcement and, in any event, does not regulate disclosure by the Congress.

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